Ethical Duties Regarding ESI in Bankruptcy Pursuant to the ABA's Model Rules of Professional Conduct

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The ethical obligations of debtor's counsel, particularly in the context of practical situations where the client may believe its best interests are in opposition to counsel's obligations— the focus and the dynamics of ESI (electronically stored information)—places attorneys at risk. One such instance is the debtor who belatedly discovers undisclosed sources of ESI on the eve of trial. Believing the information to be irrelevant, and hopefully unresponsive, the client doesn't believe disclosure is necessary. Given that bankruptcy practitioners are officers of the court, perhaps even more so than in other practice areas, ABA Model Rule 3.3 dictates that candor toward the tribunal trumps the client's instructions. The panel briefly discussed the alternative of essentially doing nothing in the way of exploring and developing the client's ESI disclosure. Aside from the carryover concerns of Rule 3.3, taking such an approach is destructive to the credibility of both debtor and counsel and undermines a series of counsel obligations under the ABA rules, including the duty of communication (Rule 1.4) and the duty to provide frank legal advice (Rule 2.1).

Given the potential for some debtors to withhold information even from their own bankruptcy counsel, the panel discussed the best practices for counsel to fulfill their obligations to their client, the court, and to limit the likelihood of violating the §707(b)(4)(C) required "reasonable investigation." A recent report from the ABA's Task Force on Attorney Discipline suggested that counsel's pre-petition duties ought to mirror the existing standard for a "reasonable inquiry" under Bankruptcy Rule 9011, citing favorable case law from a variety of

jurisdictions. Key to implementing this "investigation" rests in reviewing third-party documents such as tax returns, credit and title reports, or information obtained by pre-petition credit counselors.

The recent amendments to the Federal Rules of Civil Procedure regarding ESI seem to have produced little more than a collective yawn from many bankruptcy practitioners. Indeed, the amendments speak primarily to modern commercial litigators. The bankruptcy bar as a whole should nonetheless take notice of the emerging duties, and the emerging sources of potential malpractice, that all practitioners face as the federal judiciary ramps up its understanding of ESI issues.

The fact is, many bankruptcy lawyers may be shocked to learn that ESI should have always been a significant consideration in both commercial and consumer bankruptcies. Although terms like ESI or EDD are not found in the Bankruptcy Code, the Code has long required debtors to maintain the books and records of the estate. The Code can require the preservation and protection of estate property, which increasingly includes intellectual property in all forms of ESI. The recent rules amendments shouldn't have changed anything for most bankruptcy attorneys; the amendments should have served instead as a reflection of what we should have been doing all along.

In acknowledging that ESI in bankruptcy is a far more significant issue than simply as a consideration for discovery, two fundamental issues arise, particularly for debtor's counsel. Counsel does not want to cede "control" of a significant portion of its case development to an outside consultant or vendor, especially in a "new" and dynamic area such as ESI. Pre-amendment case law, such as the infamous *Zubulake* case, increasingly seems to narrow the range of choices for counsel. **Jack Seward** has pointed out over a number of years, and through a series of articles, the danger of the corruption or loss of data by technically inept attorneys, or

similarly inept support staff or vendors, which outweighs any potential cost savings that may be realized by the estate.

The pair continued to "fence" over these issues until just days before the ABI's 2007 Annual Spring Meeting, when Seward challenged Barrett to develop an outline focusing on counsel's ethical obligations under the ABA Model Rules of Professional Conduct, and on the Code. As Barrett eventually described it, he was instructed to "take off his cowboy hat and put on his thinking cap." Setting aside the more practical considerations of cost and "client relations," he produced an outline that generally supports Seward's view of the role of competent digital forensics in all levels of bankruptcy. Seward will no doubt claim that he said, "take off your boots and hat and you shall see the light shine on Marblehead," or something to that effect. While the outline does not address the cost concerns, it does serve as a concise starting point for applying ethical guidelines to practical situations commonly faced by debtor's counsel.

Outline of Ethical Duties Regarding ESI in Bankruptcy Pursuant to the American Bar Association's Model Rules of Professional Conduct

- Q: I just signed up a huge Chapter 11 client, and now certain to make partner. Not only am I Board Certified, but I know all about computers and software, so there shouldn't be any question about my competence, should there?

- **A: ABA Rule 1.1 establishes certain expectations of competence necessary to represent a client. This includes the "...knowledge, skill, thoroughness…" to complete the task. Comments 1 and 2 both suggest that a lawyer can take certain steps, such as association or consultation with experienced counsel or the requisite preparation and "self-training" necessary to obtain such competence. In many ways, electronic forensics can be viewed much the same way as accounting or any other professional field. While there are legal implications to be considered, ESI issues are more technically based, and likely require expertise well-beyond the current level of most practitioners. Just because debtor's counsel knows how to read a balance sheet does not mean counsel has the requisite knowledge to provide accounting services to the debtor. Just as importantly, the employment of debtor's counsel is approved by the bankruptcy court, which means that the court is the functional equivalent of a client. If counsel undertakes to guide and educate the court regarding ESI issues, counsel had better be certain about his/her level of competence.**

- Q: It is clear to me, in my legal judgment, that the client needs to bring on some third party expertise regarding all aspects of the client's digital enterprise. The client has

refused, citing price as well as concerns about third party vendors nosing around in their business. How do I resolve this dispute with my client?

- **A. In a pre-petition setting, ABA Rule 1.2, as further required by Rule 1.4, mandates that counsel consult with the client as to the means by which the objectives of representation should be pursued. Comment 2 acknowledges the friction between attorney and client when legal and tactical considerations conflict with expense, and does not prescribe a resolution of the dispute. In a Chapter 11, spending the money to hire such third-parties likely requires the court's approval, further restricting counsel's choice of options.**

- Q: Can I, as Debtor's counsel just sit back and wait for the US Trustee, or perhaps a creditor's committee to seek the ESI they need? Since they probably will anyway, why do I even need to address this with my client?

- **A: These situations are best avoided by providing the level of communication required under ABA Rules 1.4 and 2.1, before the bankruptcy petition is filed. By failing to address and prepare for these issues ahead of time, counsel is setting the debtor up for motions to dismiss or convert, and perhaps even for a confirmation fight.**

- Q: Why all the fuss about confidentiality and privilege? Between non-disclosure agreements and claw back provisions of the FRCP and rules of evidence (Rule 502), it's really no-harm/no-foul, right?

- **A: While it is true that Rule 26(b)(5)(B) does seem to incorporate a "clawback" procedure (and a proposed Rule of Evidence 502 would act in a similar fashion), those procedures only act to correct the error and return inadvertently disclosed documents to their rightful owner.**

  The current version of ABA Rule 1.6 does not make any provision for such disclosures. Comments 2-4 reinforce the ethical and professional necessity to protect the client's secrets. Simply because procedure allows counsel to regain possession will not absolve counsel of their sins for losing the documents in the first place.

- Q: My debtor client sent me DVD's full of document images, and asked me to keep them, because they couldn't afford storage anymore. My paralegal mistakenly copied all of her iTune downloads of old television shows onto what turned out to be re-writeable DVDs. Can I plead excusable neglect?

- **A: ABA Rule 1.15 addresses counsel's duties regarding the safe-keeping of client's property. Although the rule primarily addresses client funds, Comment 1 sufficiently clarifies that all property of a client should be held with the "care of a professional fiduciary." The Comment further specifies that property should be separated from the lawyer's business and personal property. Key to compliance with Rule 1.15 is counsel's understanding, as well as associates and staff, that ESI is property. In a bankruptcy setting, debtor's ESI is also property of the estate.**

- Q: I represent a small company, although my only contact has been with the entity's CEO, who is also the majority shareholder. The company has just been forced into an involuntary chapter 11, who learned before I did that the CEO recently started bleeding the entity of capital. The CEO is on the phone asking about how to legally "dispose" of any troublesome electronic records. What, if anything, do I tell him?

- **A: ABA Rule 2.1 likely requires some form of response to the CEO, but in his capacity as CEO of the client entity, and not as the person who chooses which law firm gets the lucrative business of the entity. Comments 1 and 2 reinforce the notion that the attorney role and the counselor role are not mutually exclusive. ABA Rule 1.13 addresses this dilemma in greater length, and the accompanying Comment, in its entirety, is worthy of review.**

  The tension between counsel's duties of communication and rendering candid legal advice, and the practical effect of telling the CEO "NO", are vividly resolved by ABA Rule 3.4(a), (b) and (c). ABA Rule 3.3(b) and (c), regarding candor to the tribunal should also be reviewed, especially given the bankruptcy system's reliance on the candor and character of the bankruptcy bar.

- Q: My brand new Chapter 11 case is a fairly good-sized case, with multiple locations, lots of employees, and all kinds of ESI tucked away in every nook and cranny. Still, the debtor is cash poor. A litigious creditor just sent me a stack of discovery requests four feet thick. I want to avoid responding, or at least avoid having my debtor pay for the cost of production, just because we don't have the time or the resources to devote to discovery. Can't I just ask the court to help me with some "cost-shifting"? Maybe even make the creditor send it own vendor in here to find the stuff they want?

- **A: At the outset, making the request on this basis alone may violate ABA Rule 3.1 regarding meritorious claims and contentions. Recent opinions indicate that a producing party cannot avoid the cost of production merely due to the time and effort required to find the ESI, and that cost-shifting "does not even become a possibility unless first there is a showing of inaccessibility." *Peskoff v. Faber,* 2007 WL 530096 (D.D.C. Feb. 28, 2007). Cost alone will not "relieve Defendant of its duty to produce those documents…", especially if the producing parties' chosen method of preservation contributes to the expense. *AAB Joint Venture v. U.S.*, 2007 WL 646157 (Fed. Cl. Feb. 28, 2007).**

  Counsel must be aware of their duties under FRCP 26(b)(2)(B), which requires the debtor in this scenario to produce relevant, non-privileged, reasonably accessible ESI. Future case law on this topic is likely to be very dynamic, and bankruptcy courts may approach the topic from the point of policy unique to bankruptcy, and somewhat removed from the view of a litigator. Even outside of litigation, the debtor has a *minimum* standard for disclosure found in §521 of the bankruptcy code.

  In addition, true "small business" cases have additional duties of disclosure under §308. Seeking the assistance of the bankruptcy court without addressing these

duties likely violate ABA Rule 3.1. Inviting third-party vendors, especially those employed by an adverse party, is an invitation to violate ABA Rule 1.6, intended to protect client confidentiality. Aside from infringing on the attorney-client relationship, this approach is a trap for the unwary as related to ABA Rule 4.4(b). Rule 4.4(b) requires the recipient of inadvertently disclosed information (presumably relating to third parties) to notify the sender of same.

However, nothing in 4.4(b) requires the recipient to return or destroy the document, and nothing under the ABA Model Rules prevents the recipient from reading or accessing the contents of the document. By way of clarification, Comment 2 to Rule 4.4 includes email and other electronic documents in the definition of "document". For the sending attorney, allowing the disclosure of third-party information may violate a number of duties and relationships as between the client and the third party. By allowing such inadvertent disclosure, compliance with ABA Rules 1.1, 1.15, 5.1 and 5.3 is suspect.

- Q: After a single "meet and confer" and a couple of months of scanning and reviewing documents, it is time for a scheduling conference. Just before the conference, the client's representative reveals that over 1,000 back-up tapes were just discovered in a storage closet. The rep isn't concerned, believing that the tapes aren't relevant. Moreover, opposing counsel is fresh out of law school, used outdated definitions and forms for his discovery requests, and asked for documents, but not ESI. The judge, not having had any cases involving ESI prior to this one, inquires of counsel if discovery is complete. Delay now would set the trial back at least a year, and would cost the client a king's ransom in processing the newly found tapes.

- **A: While ABA Rule 3.2 requires counsel to make "reasonable efforts to expedite litigation consistent with the interests of the client", representing to the court that discovery had indeed been completed, would be neither reasonable, nor in the client's best interests. Moreover, ABA Rule 3.3(a)(1) requires the disclosure of the discovery of the tapes. Even if opposing counsel, or the client, has the law wrong, Rule 3.3(a)(2) prohibits counsel from knowingly failing to disclose legal authority contrary to the client's position.**

- Q: This ESI stuff is awfully complicated. My firm just hired two young hot shots straight out of law school. They might not know a lot about practicing law, but one of them proved during his interview that he knew how to use his Blackberry, and the other one fixed the blinking clock on the VCR in the break room. What more do we need to do to ethically provide services to our clients regarding ESI?

- **A: First review ABA Rule 5.1. Rule 5.1(a) concludes that partners have to make "reasonable efforts" to ensure that the firm has implemented "reasonable assurances" that the two new hot shots conform to the rules of professional conduct.**

  First and foremost, that brings us full circle to ABA Rule 1.1, regarding competence. If the partners have little, or inadequate, knowledge and understanding of the impact, effect, complexity and evolving nature of ESI, how can the partners be certain to have made the "reasonable efforts" necessary to comply with their own obligations under the rules? Non-partner, supervisory attorneys have the same obligations under Rule 5.1(b).

- Q: We encouraged the two "hot shots" to pursue other opportunities. We have had a long, successful relationship with a print shop that has now expanded into providing ESI-related services. They have an in-house expert, they put on presentations, and they have a lot of expensive looking James Bond type computer stuff. Can't we just give all the ESI stuff to them and then have our paralegals make a pass through the "stuff" for a privilege review?

- **A: ABA Rule 5.3 requires supervisory level attorneys to take reasonable steps to ensure that non-lawyer assistants conduct themselves in a manner compatible with the rules. This includes the implementation of internal policies and procedures designed conform non-lawyer's conduct. As for the "hot shots", ABA Rule 5.2 (a) is a reminder that they are not excused from their personal obligations in conforming to the Model Rules, even if their actions are conducted at the direction of another person.**
- Q: Debtor's counsel just sent me a ton of ESI in discovery responses. Many of the documents contain metadata, some of which might contain third party information. Other documents appear to have had the metadata scrubbed. What is going on?

- **A: The ABA issued Formal Opinion 06-442, on August 5, 2006, regarding the Review and Use of Metadata. The Opinion provides a great deal of insight into the numerous issues surrounding metadata and conforming with the ABA Model Rules.**

  The recipient of privileged or confidential information that is stored in metadata may have to look to obligations beyond the ABA Rules to determine how to handle such materials. The transmittal and disclosure of metadata has not been characterized as either inadvertent or advertent, and no Model Rule provides guidance on the advertent transmittal of information, according to ABA Formal Opinion 06-440 (May 13, 2006).

  As discussed above, the recipient of inadvertently disclosed third-party information has a duty to notify the sender under Rule 4.4. The issue of "scrubbing" metadata is more complex. If the metadata contains privileged or confidential information, ABA Rule 1.6 requires that steps be taken to secure and protect such information.

  Although outside the ABA Model Rules, such disclosures ought to be accompanied by communications or a privilege log identifying the data scrubbed, and the basis for doing so. Over-anxious counsel that "scrubs" all of the metadata (or has it scrubbed by someone with the technical expertise to do so) may very well violate ABA Rules 1.1, 1.15, 2.1, 3.2, 3.4, 5.1 and 5.3. Unilateral deletion of metadata may be the digital functional equivalent of shredding harmful paper files. While the media may be different, the effects of spoliation and other sanctions are the same.

- Q: A consumer debtor is discovered to have successfully, at least for a time, hidden significant assets from the estate and the Trustee. Under BAPCPA, what are the standards of due diligence to protect debtor's counsel from subsequent litigation/sanctions?

- **A: According to an October 2005 report by the ABA's Business Law Section Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes – Task Force on Attorney Discipline, titled *Attorney Liability under §707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, the "reasonable investigation" required by BAPCPA ought to interpreted the same as the "reasonable inquiry" under Bankruptcy Rule 9011. The Task Force Commentary positively viewed case law establishing the pre-filing standard, given the role of attorney as an officer of the court, as:**

  1) Explaining the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor;
  2) Asking Probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor;
  3) Check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent;
  4) Demand of the debtor full, complete, accurate, and honest disclosure of all information required be fore signing and filing the petition; and,
  5) Seek relief from the court in the event the attorney learns of having been misled by a debtor.

See *In re Robinson*, 198 B.R. 1017, 1024 (Bankr. N.D. Ga. 1996); *In re Armwood*, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994); *In re Matthews*, 154 B .R. 673, 680 (Bankr. W.D. Tex. 1993).

The Commentary also points out that many of these requirements will be satisfied by the required filing of the §342(b) notice.

In keeping with ABA Rule 5.3, the Task Force also noted that nothing in §707 appears to prohibit the use of paraprofessionals from assisting in the "investigation" or inquiry; however, standards of supervision still apply.

Of the Task Force's recommendations, perhaps the one with the most substance and greatest practical application was the recommendation that, as part of the reasonable investigation, attorneys ought to be allowed to rely upon documents prepared by third parties, such as "tax returns, credit and title reports, child support enforcement agency statements, or information from the debtor's pre-petition credit counseling agency." Aside from the §342(b) notice, inclusion of the explanation and expectation of counsel in the engagement letter or contract with the client should aid counsel in meeting, at least partially, its "investigative" duties.

It appears that post-BAPCPA, only one bankruptcy court has reviewed debtor's counsel behavior in light of §707(b)(4)(C). See *In re Alvarado*, 2007 Bankr. LEXIS 533 (Bankr. E.D. Va. January 8, 2007). In *Alvarado* though, the court was faced not with the fraud of a debtor, but rather with the apparent fraudulent behavior of counsel who, according to the opinion, was seemingly unaware of any of the BAPCPA amendments.

It is not unreasonable to expect that a bankruptcy court might delve deeper into all the facts and circumstances in the face of a commercial 7, or in the case of a consumer 7 where the debtor previously had significant assets. Counsel should be prepared in those instances to demonstrate that additional information regarding assets, transfers, status of the books and records of the estate. Possible sources for completion of this level of investigation might include Dunn & Bradstreet reports, an itemized Rule 26 type disclosure of the location and types of ESI available, or even the pre-petition hiring of a forensic consultant to provide third party corroboration as to the status, contents and security of the ESI.