INTERIM REPORT

on

Electronic Discovery (ESI) Issues in Bankruptcy Cases

Prepared by

ABA Electronic Discovery (ESI) in Bankruptcy Working Group

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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 being 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 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 of the United States Trustee 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.

While the work of the Electronic Discovery (ESI) in Bankruptcy Working Group is continuing, it was thought that it would be useful to prepare and issue an Interim Report to invite and stimulate comments from a wider audience with respect to preliminary guidelines prepared by the Working Group in three bankruptcy-related subject areas: (i) large Chapter 11 cases; (ii) middle market and smaller Chapter 11 cases; and (iii) Chapter 7 and Chapter 13 cases. These Guidelines are intended to assist the bench and the bar in dealing with ESI issues in bankruptcy cases. Attached as Appendix 1 to this Interim Report are draft Electronic Discovery (ESI) Principles and Guidelines in Large Chapter 11 Cases. Attached as Appendix 2 are draft Electronic Discovery (ESI) Principles and Guidelines in Middle Market and Smaller Chapter 11 Cases. Attached as Appendix 3 are draft Electronic Discovery (ESI) Principles and Guidelines in Chapter 7 and Chapter 13 Cases. It should be noted that while this has been a collaborative and interactive process, not all Working Group members agree on all points in the draft Guidelines.

The general subject of electronic discovery (ESI) issues in litigation has engendered much commentary, discussion and debate in recent years and a

* This Interim Report is not, and should not be construed as, the official policy or position of the American Bar Association (ABA).

significant number of legal opinions. The draft Guidelines 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 draft Guidelines.

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 Interim 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 (the "Sedona Principles"). 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 Interim Report is intended to supplement those principles and guidelines and provide more particularized guidance on issues concerning electronically stored information (ESI) in connection with bankruptcy cases.

The Working Group invites comments on the draft Guidelines from any interested parties. The purpose of circulating the draft Guidelines at this time is to get input from a broader group and stimulate discussion and heighten awareness concerning electronic discovery (ESI) issues in bankruptcy cases. At the same time, the Working Group will continue its work on other issues that it envisions as being part of its more comprehensive report. Those issues include more detailed consideration of ESI issues in adversary proceedings and contested matters in bankruptcy cases and in the bankruptcy claims objection process.

Comments on the draft Guidelines should 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; email address: rlwasserman@venable.com; telephone 410-244-7505. The names of the other members of the Working Group are set forth below.

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Richard L. Wasserman (Chair), Venable LLP, Baltimore, MD

Paul M. Basta, Kirkland & Ellis LLP, New York, NY
Hon. Stuart M. Bernstein, United States Bankruptcy Judge, Southern District of New York
Lee R. Bogdanoff, Klee, Tuchin, Bogdanoff & Stern LLP, Los Angeles, CA

Hon. Philip H. Brandt, United States Bankruptcy Judge, Western District of Washington
William E. Brewer, Jr., The Brewer Law Firm, Raleigh, NC
Jonathan D. Brightbill, Kirkland & Ellis LLP, Washington, DC
Gillian N. Brown, Pachulski Stang Ziehl & Jones LLP, Los Angeles, CA
Hon. Samuel L. Bufford, The Dickinson School of Law, Pennsylvania State University, University Park, PA
Timothy J. Chorvat, Jenner & Block LLP, Chicago, IL
Mark D. Collins, Richards Layton & Finger, P.A., Wilmington, DE
Dennis J. Connolly, Alston & Bird LLP, Atlanta, GA
John P. Gustafson, Standing Chapter 13 Trustee, Toledo, OH
Scott A. Kane, Squire Sanders LLP, Cincinnati, OH
Christopher R. Kaup, Tiffany & Bosco P.A., Phoenix, AZ
Stephen D. Lerner, Squire Sanders LLP, Cincinnati, OH
David P. Leibowitz, Lakelaw, Waukegan, IL
Judith Greenstone Miller, Jaffe Raitt Heuer & Weiss P.C., Southfield, MI
Robert B. Millner, SNR Denton US LLP, Chicago, IL
Prof. Jeffrey W. Morris, University of Dayton School of Law, Dayton, OH
Salvatore A. Romanello, Weil Gotshal & Manges LLP, New York, NY
Camisha Simmons, Fulbright & Jaworski L.L.P., Dallas, TX
Jeffrey L. Solomon, The Law Firm of Jeffrey L. Solomon, PLLC, Woodbury, NY
Marc S. Stern, The Law Office of Marc S. Stern, Seattle, WA
Clifford J. White, III, Executive Office for United States Trustees, Washington, DC

APPENDIX 1

Electronic Discovery (ESI) Principles and Guidelines in Large Chapter 11 Cases

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 (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production ("Sedona Principles"). Rather, they are intended to provide more particularized guidance on issues concerning electronically stored information ("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.

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. <u>At Time of Filing of Chapter 11 Case.</u>

- 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 pre-petition 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 professional.

3. <u>Within 45 to 60 Days of Petition Date or At or Before Final Hearing on Bankruptcy Rule 4001 Matters</u>.

- 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 45 to 60 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 then and in the future engaged in litigation with a debtor, including the debtor, from seeking ESI-related relief particularized to such litigated matter.

APPENDIX 2

Electronic Discovery (ESI) Principles and Guidelines in Middle Market and Smaller Chapter 11 Cases

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 (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production ("Sedona Principles"). Rather, they are intended to provide more particularized guidance on issues concerning electronically stored information ("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 an 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. <u>At Time of Filing of Chapter 11 Case.</u>

- 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 pre-petition 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 professional.

3. <u>Consideration of an ESI Protocol If Appropriate in the Case</u>.

- 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 then and in the future engaged in litigation with a debtor, including the debtor, from seeking ESI-related relief particularized to such litigated matter.

4. <u>ESI Considerations During the Case</u>.

- 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. <u>See</u> 11 U.S.C. §§ 363(b)(1), 332 and 333. 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.

APPENDIX 3

Electronic Discovery (ESI) Principles and Guidelines in Chapter 7 and Chapter 13 Cases

Electronic Discovery (ESI) Principles and Guidelines
in Chapter 7 and Chapter 13 Cases

- Consistent with the principles underlying §§ 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 electronically stored information should be proportional to the resources and sophistication of the debtor, the significance of the matter to which the electronically stored information relates and the amount or value of the property at issue. Whether or not 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, electronically stored information 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, electronically stored information exists that relates to property of the estate.

- A chapter 7 trustee may request a debtor to preserve electronically stored information 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 order from the Bankruptcy Court, as part of a request for a Bankruptcy Rule 2004 examination or otherwise, to preserve and/or turnover electronically stored information. 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 electronically stored information 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 electronically stored information 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 turnover electronically stored information. 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 Rule 7001 *et seq*. 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 electronically stored information 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 electronically stored information 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 electronically stored information 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 electronically stored information 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 ESI Guidelines is intended to alter or affect any applicable privilege, including attorney-client privilege, or work-product protection of communications, documents or electronically stored information, as such doctrines exist under otherwise applicable law.