Plug In: Electronic Evidence in Bankruptcy Cases

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Hon. Peter G. Cary
U.S. Bankruptcy Court (D. Me.); Portland

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Materials

Practical Pointers for Debtor's Counsel

Keri L. Wintle
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Assess Your Client's ESI Landscape ASAP – If an adversary proceeding or contested matter is likely, be sure to have a discussion with the debtor as early as possible about where ESI may be located.

- Take an inventory of all social media accounts utilized by the debtor; obtain their usernames for each account, including, but not limited to, the following:
    - Facebook
    - Twitter
    - LinkedIn
    - Instagram
    - blogs
    - other
- Identify whether the debtor has posted any comments relating to the adversary proceeding or contested matter using their social media accounts.
- Identify whether the debtor has exchanged text messages, iMessages, emails, left/received voice messages relating to the adversary proceeding or contested matter.
- Identify any off-line sources of ESI (laptops, smartphones, tablets, removable storage devices (USB keys, back-up hard drives), answering machines).
- Identify any cloud storage maintained by the debtor that may contain discoverable ESI.

Avoid Claims of Spoliation: Communicate Your Client's Duty Not to Destroy Information – Be sure to communicate to your client that they have an obligation not to delete relevant computer

files, emails, information on social networking sites, or other ESI. Caution your client that deleting posts or comments on social media that may be even marginally relevant to the claims and potential defenses in an adversary proceeding or contested matter could constitute spoliation.

Maintain Forms of Litigation Hold Letters – An ounce of prevention is worth a pound of cure: maintain current forms of litigation hold letters that may be sent as soon as discovery of ESI is deemed likely, in order to avoid spoliation.

Samples of the following are attached:

- Litigation Hold Letter to Client
- Litigation Hold Letter to Defendant/Non-Debtor Custodian

Cooperate with Opposing Counsel – Cooperation at the Rule 26(f) Conference and throughout the discovery process will reduce both costs and headaches. Identifying specific sources of ESI based upon your early assessment and preservation will allow parties to narrow the scope of discovery and streamline production.

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May 16, 2014

Cleo Client
10 Smith Street
Boston, MA 02134

Re: Our Client Name
Our Client Number

Dear Cleo:

This letter contains important information. Please read it carefully and contact me with any questions or concerns.

As you may know, and as we discussed in our meeting, electronically stored data may be an important and irreplaceable source of discovery and/or evidence in this matter. Since we will be filing a lawsuit, you must preserve all information from your personal computer systems, removable electronic media, and other locations relating to the appraisal of the property, as well as your purchase and financing of the property. This includes, but is not limited to, e-mail and other electronic communication, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, Internet usage files, and network access information. Additionally, you need to preserve all information stored on your portable devices, such as PDAs and cell phones.

You must take every reasonable step to preserve this information until further notice from me. **Failure to do so could result in extreme penalties against you, including your lawsuit being dismissed!**

If this correspondence is in any respect unclear, please contact me.

Sincerely yours,

Counsel

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May 16, 2014

[target]

Re: Our Client Name
Our Client Number

Dear [name]:

This letter is to notify you that potential litigation is contemplated against you and [target] stemming [claim] (herein referred to as the "Claim"). In connection with this Claim, you may have in your possession, custody, or control documents, information, and electronically or digitally stored information ("Documents") relevant to the Claim. In addition, you and/or your agents and employees may have knowledge of facts relevant to the Claim.

You are under a legal duty to preserve, retain, and protect all possibly relevant evidence, including Documents, once litigation appears imminent or has commenced. By virtue of this letter, you are to immediately assume that litigation is imminent. The failure to preserve and retain Documents, including the electronic data and electronic evidence outlined in this notice constitutes spoliation of evidence and will subject you to legal claims for damages and/or evidentiary and monetary sanctions.

For purposes of this notice, the terms "electronic data" or "electronic evidence" includes but is not limited to all text files (including word processing documents), presentation files (such as PowerPoint), spread sheets, e-mail files and information concerning e-mail files (including logs of e-mail history and usage, header information, and deleted files), Internet history files and preferences, graphical files in any format, databases, calendar and scheduling information, task lists, telephone logs, contact managers, computer system activity logs, and all file fragments and backup files containing electronic data. The terms include information maintained with internet based service providers (including so-called "cloud providers") through accounts accessible by you, your agents and/or employees.

Specifically, you are instructed not to destroy, disable, erase, encrypt, alter, or otherwise make unavailable any Documents, including electronic evidence, relevant to the Claim, and you are further instructed to take all reasonable and necessary efforts to preserve such data. To meet this burden, you are instructed by way of example and not limitation, to:

- Preserve all data storage backup files (i.e., not overwrite any previously existing backups);

- Preserve and retain all electronic data generated or received by employees who may have personal knowledge of the facts involved in the Claim, including but not limited to those of [persons with info];

- Refrain from operating (or removing or altering fixed or external drives and media attached thereto) any workstations or laptops that are reasonably thought to have data related to the Claim, including but not limited to the workstations and laptops of [persons with info];

- Preserve and retain all data from servers and networking equipment logging network access activity and system authentication;

- Preserve and retain all electronic data in any format, media, or location relating to the Claim, including data on floppy disks, CDs, DVDs, tape, PDAs, thumbdrives, smart phones, tablets, or cell phones;

- Preserve and retain all information stored with internet based service providers, or accessible through accounts held by you, your agents and/or your employees;

- Prevent employees from deleting or overwriting any electronic data related to the Claim; and

- Take such other security measures, including, but not limited to, restricting physical and electronic access to all electronically stored data directly or indirectly related to the Claim.

To facilitate the preservation of data, this firm has engaged [vendor] to forensically acquire the hard drives and other media that may contain electronic data related to the Claim. Upon receipt of this letter, please call me, or have your counsel call me, so that we may arrange the details of the acquisition.

Thank you for your cooperation.

Sincerely yours,

[attorney]
Counsel to the Plaintiff

Enc.

cc: Lead Attorney and Client

A Summary of Best Practices for Preserving Electronically Stored Information in Consumer Cases

Warren E. Agin, Esq.
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In 2013, the ABA Electronic Discovery in Bankruptcy Working Group issued its Best Practices Report on Electronic Discovery (ESI) Issues in Bankruptcy Cases. The report addresses parties' obligations to preserve electronically stored information, also known as ESI, in the context of a bankruptcy case or proceeding. The ABA originally published the report in Volume 68 of The Business Lawyer. Complete copies of the report are available on Lexis or Westlaw, or on the website for the ABA Business Law Section's The Business Lawyer.

In general, the report discusses the scope and timing of preservation obligations. Outside the bankruptcy context, a party to potential litigation must take additional steps to preserve ESI when litigation is reasonably anticipated. In the bankruptcy context, the line is hard to discern between reasonably anticipated litigation and potential litigation. The bankruptcy process is a blend of administrative and adversarial processes and the fact that a regular business process could, potentially, evolve into litigation and evidentiary hearings, does not necessarily mean that the duty to preserve ESI for litigation purposes expands to all aspects of the bankruptcy process. The report attempts to aid the practitioner discern the point at which the bankruptcy process requires a debtor or creditor to take additional steps to identify and preserve ESI. It also provides guidelines to assist the practitioner to discern the scope of information that should be preserved. The report analyzes the issues from six different perspectives: the large Chapter 11 case, the middle-market or small Chapter 11 case, Chapter 7 and 13 cases, filing proofs of claims, creditors, and contested and adversary proceedings. This summary discusses the recommendations for Chapter 7 and 13 cases.

Traditionally, the consumer or small business debtor does not think about preservation of ESI at all. Unlike a sophisticated corporate debtor, the debtor probably lacks processes in place to preserve ESI, create data backups, track the locations of information, or manage data deletion in a controlled manner. As a result, the possibility exists that the debtor will, at any time, delete needed ESI. But, where litigation is reasonably anticipated in connection with the case, the debtor does have an obligation to preserve relevant ESI and debtor's counsel will need to proactively discuss the issue with her client, help the client understand what ESI is available and needs to be preserved, and also help the client understand how to put in place processes to preserve the ESI. The consumer debtor also has obligations to the Chapter 7 or Chapter 13 trustee, and deletion of ESI can prevent the debtor from performing those obligations.

For chapter 7 and 13 cases, the report sets forth a list of ten rules that counsel can use to engage best practices in ESI preservation.

1. "Chapter 7 and Chapter 13 debtors should, unless otherwise justified under the circumstances of the case, not destroy information, including ESI, relating to their bankruptcy case." This broad obligation is based on the debtor's obligation to provide information to the bankruptcy trustee, and the general dangers, such as a loss of discharge, that can result from an intentional deletion of case related ESI. Particularly in the business chapter 7 case, ESI needs to be preserved for potential surrender to the Trustee. Counsel need to discuss this obligation with clients early in the process, making sure the client understands not to delete computer files, e-mails, information on social networking sites, and other source of ESI. In some cases, special care might be taken to back-up data and preserve a copy with counsel.

2. "A debtor's obligation with respect to the preservation and production of ESI should be proportional to the resources and sophistication of the debtor, the significance of the matter to which the ESI relates, and the amount or value of the property at issue." The report calls this the "Proportionality Principal."

3. Preservation of ESI will not become an issue unless raised by another party, such as the trustee, the U.S. Trustee's Office, or a creditor. Counsel should take into account the potential for litigation issues in the case, and if a case is an asset case, help the client identify ESI related to property of the estate.

4. Specific obligations to preserve ESI might result from a Chapter 7 trustee's request for preservation or information, a request from the U.S. Trustee, or a motion for authority to conduct a Rule 2004 examination. In these cases "relevance, reasonableness, and proportionality should be applied to any such request, depending upon the circumstances of each case."

5. In chapter 13 cases, a debtor should preserve the documents required by statute, and "subject to the proportionality principle and reasonableness and relevance, preserve ESI concerning the same subject matter as the documentary materials required to be retained by the debtor."

6. The chapter 13 trustee might request that ESI be retained. "Relevance, reasonableness, and proportionality should be applied to any such request, depending upon the circumstances of each case."

7. "If adversary proceedings are filed in a chapter 7 or chapter 13 case, the ESI preservation and production obligations set forth in Bankruptcy Rules 7026, 7033, 7034, and 7037 apply." If an adversary proceeding is reasonably likely in a case, counsel should discuss ESI preservation with the debtor. In addition, the debtor should understand that the trustee may need to identify and obtain ESI in connection with adversary proceedings against third parties, and the debtor may have to assist in that process.

8. Counsel for creditors involved in adversary proceedings or significant contested proceedings should discuss with their clients whether relevant ESI should be preserved in connection with the proceeding.

9. "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."

10. Notwithstanding the obligations to preserve ESI, applicable privileges, such as the attorney client privilege, still apply.

Selected Caselaw and Rules Update on Sanctions for ESI Spoilation or Discovery Abuse

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A. Remedies for Discovery Misconduct or Spoliation of ESI

In general, the producing party has an obligation to use the availability of information in electronic form to simplify discovery, to be open about the capabilities of its systems to produce information, and to maintain the integrity of that information.

1. 2006 Amendments to Federal Rules of Civil Procedure

a. Federal Rules 34 and 37 are applicable in adversary proceedings under Bankruptcy Rules 7034 and 7037, and in contested matters under Bankruptcy Rule 9014 (c).

b. Federal Rule 34(b)(2)(D) and (E) specify explicit procedures for responding to requests for ESI. The rule contemplates that the requesting party will specify the form (i.e. format) in which ESI is to be produced (e.g. native format or image format).

c. Federal Rule 37(e) now states that absent "exceptional circumstances," the court may not impose sanctions for failing to produce ESI lost "as a result of the routine, good-faith operation of an electronic information system."

2. Proposed Amendments to Rule 37(e)

The Judicial Conference's Advisory Committee on Civil Rules proposed a package of revisions to various rules in August 2013, including revisions to Rule 37(e). Following public hearings, the Committee's Discovery

Subcommittee has made it recommendations, which include substantial revision of the Committee notes accompanying the rules and to the text of Rule 37(e). The Advisory Committee recommendations will be transmitted to the Standing Rules Committee for consideration at its May 28-29, 2014 meeting.

The main difference between the August 2013 proposal and the Discovery Subcommittee's recommendation is the elimination of any requirement for showing prejudice before imposition of curative measures (e.g. case management tools like additional discovery and attorney's fees) or an adverse jury instruction and other severe sanctions. *See* J. Rabiej, *A Funny Thing Happened on the Way--or Discovery Subcommittee's Revised Rule 37(e) Returns to "Gotch" Litigation*, 2014 Lexis Emerging Issues 7173 (April 3, 2014).

Whichever version of Rule 37(e) is adopted, it will provide greater clarity by eliminating the Circuit split on the standard for imposing the severest sanctions on a party that fails to preserve discoverable ESI.

3. Sources of Authority for Sanctions

   a. Rule 37 has been interpreted to authorize sanctions only for violation of a discovery related order. *Brandt v. Vulcan, Inc.,* 30 F.3d 752, 756 (7th Cir. 1994).

   b. Federal courts also have inherent authority to manage their own proceedings to control the conduct of those persons that appear before them. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

Some bankruptcy courts also cite 11 U.S.C. § 105(a) as a source of authority to impose discovery sanctions, *In re: Krause*, 367 B.R. 740, 770 (Bankr. D. Kan. 207), but this may be unnecessary given the court's inherent powers.

c. 28 U.S.C. § 1927 authorizes an award of costs, expenses and reasonable attorney's fees associated with vexatious litigation activities that needlessly prolong proceedings, and can be used where a party engages in discovery abuse related to disclosure of ESI.

4. Negligent Failure to Disclose or Preserve ESI

Spoliation includes failure to preserve relevant ESI. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F.Supp. 2d 456, 465 (S.D.N.Y. 2010). The duty to preserve evidence arises when a party reasonably anticipates litigation. *Id*. at 465.

But not every document need be retained. *See McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 156 (D. Mass. 1997)(party need not retain every document edit or draft); *E.I. Dupont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 496 (E.D. Va. 2011)(court recognized that litigants are not required to preserve every shred of paper, email, or electronic document because such a rule would "cripple" large corporations).

In re A & M Florida Properties II, LLC v. American Federated Title Corp., 2010 Bankr. LEXIS 1217 (Bankr. S.D.N.Y. 2010). Counsel for the

Plaintiff failed to take the time to fully understand the client's e-mail storage systems, namely the various locations where e-mails could be stored by employees, resulting in multiple motions to compel and appointment of an outside contractor to locate all relevant electronic records in this breach of contract case. No documents were lost or destroyed, but unnecessary costs were incurred, resulting in an award of fees payable by Plaintiff and its counsel. Embarrassing!!!!!, but not harmful to the client's case.

McDonald v. One West Bank, FSB, 929 F. Supp. 2d 1079 (W.D.Wash. 2013). In this action to enjoin a foreclosure sale, the lender submitted in support of summary judgment a declaration from an employee that had no personal knowledge of the facts asserted, including the location of source documents underlying computer records, and merely repeated information obtained from co-workers with personal knowledge. Following multiple motions to compel discovery, the lender made late disclosures of computer records relevant to the key question of possession of the original mortgage note, and filed a declaration from a documents custodian that still did not resolve the factual disputes over the location of the original note. The court awarded $25,000 in monetary sanctions to plaintiff under Rule 37 and 28 U.S.C. § 1927 for discovery abuse.

5. Failure to Produce or Preserve-Adverse Inference or Preclusion

Generally, the harsher sanction of an adverse inference against the party that failed to produce or preserve evidence is reserved for cases where

there is a level of culpability greater than mere ordinary negligence. Whether sufficient culpability exists is determined case by case. But courts vary on the level of culpability they will require before imposing sanctions.

Compare Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010)(severe sanction of giving adverse inference instruction may not be imposed without evidence of bad faith), *with Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F.Supp. 2d 456, 465 (S.D.N.Y. 2010)(proof of relevance and prejudice justifies imposition of severe sanction against merely negligent spoliating party).

In re Heinz, 501 B.R. 746 (Bankr. N.D.Ala. 2013). In this dischargeability action, the court granted an adverse inference against a sophisticated debtor that failed to preserve ESI and backup paper documents and then did not disclose the existence of a thumb drive containing many of the electronic records until trial testimony.

The Second Circuit's formulation of the standard for awarding an adverse inference remains good law. *See Schulman v. Saloon Beverage,* 2:13-cv-193 (D.Vt. April 18, 2014), citing *Residential Funding Corp. v. DeGeorge Home Alliance, Inc.*, 306 F.3d 99 (2nd Cir. 2002):

"In order to obtain an adverse inference instruction regarding the loss or destruction of the original computer data, the movant must establish:

(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."

Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner. *Residential Funding Corp.*, 306 F.3d at 109.

When evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance. But when the destruction is only negligent or reckless, the party seeking sanctions must prove relevance. *In re: Siegmund Strauss, Inc.*, 2013 Bankr. LEXIS 2880 (Bankr. S.D.N.Y. 2013).

6. The Ultimate Sanction—Dismissal or Default Judgment

In general, the ultimate sanction is granted in only extreme circumstances involving willful destruction of relevant evidence. Also, the court has wide discretion to fashion sanctions that are appropriate in the circumstances of the particular case, and can order turnover of computer hardware and passwords to permit forensic inspection, retention of forensic experts at the expense of the offender, and other injunctive relief.

a. Shifting Burden of Proof on Prejudice

Micron Technology, Inc., v. Rambus, Inc., 917 F. Supp. 2d 300, 319 (D. Del. 2013)(bad faith spoliator "carries heavy burden" to show lack of prejudice because person who destroys documents should not be permitted to excuse conduct by claiming that vanished documents were of minimal relevance).

In re Krause, 367 B.R. 740 (Bankr. D. Kan. 2007). The U.S. Government and Ch. 7 trustee objected to discharge of $3 million in tax debt and sought to avoid numerous asset transfer to trusts controlled by the debtor as fraudulent, and declare the trusts and other transferee entities nominees of debtor includable in the estate. The court ordered the debtor to turn over his computers to the trustee, and before doing so, the debtor installed a program on the computers that wiped many important documents from the computers' hard drives. The court granted default judgment to the Government and the trustee on numerous claims, held the debtor in contempt for violating numerous discovery orders, ordered the turnover of other computer hardware, and ordered the debtor to turn over his passport to the Clerk.

b. Higher Standard of Proof

The standard of proof may be higher where more serious sanctions such as dismissal or default judgment are sought. Clear and convincing evidence of willfulness, bad faith, or fault can be required for the sanction of dismissal with prejudice or default judgment, as this form of relief is penal in nature. *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003). The

preponderance of evidence standard applies to sanctions such as adverse inferences and preclusion of evidence, because they are fundamentally remedial and do not preclude hearing on merits. *Id*.

References and Checklist for Establishing Authenticity of Paperless Electronic Records Under Federal Rules of Evidence

Andre D. Bouffard
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References:

In re Vinhee, 336 B.R. 437 (BAP 9th Cir. 2005)

In re McFadden, 471 B.R. 136 (Bankr. D.S.C. 2012)

Edward J. Imwinkelred, *Evidentiary Foundations* §4.03[1] (5th ed. 2002)

5 Weinstein § 900.07[1][b][i]

Manual for Complex Litigation (Fourth) § 11.446 (2004)

The Manual for Complex Litigation describes the problem this way:

In general, the Federal Rules of Evidence apply to computerized data as they do to other types of evidence. Computerized data, however, raise unique issues concerning accuracy and authenticity. Accuracy may be impaired by incomplete data entry, mistake in output instructions, programing errors, damage and contamination of storage media, power outages, and equipment malfunctions. The integrity of the data may also be compromised in the course of discovery by improper search and retrieval techniques, datat conversion, or mishandling.

Checklist:

1. The proponent of the record uses a computer.

2. The computer is reliable.

3. The proponent has developed a procedure for inserting data into the computer.

4. The procedure has built-in safeguards to ensure accuracy and identify errors.

Note: under this element, the proponent should describe the computer policy and system control procedures, such as control of access to the database, control of access to the program, recording and logging of changes, data backup practices, and audit procedures to assure continuing integrity of the records

5. The proponent keeps the computer in a good state of repair.

6. The witness had the computer readout certain data.

7. The witness used the proper procedures to obtain the readout.

8. The computer was in working order at the time the witness obtained the readout.

9. The witness recognizes the exhibit as the readout.

10. The witness explains how he or she recognizes the readout.

11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

Electronic Evidence in Bankruptcy Cases
Excerpts of Relevant Rules

FEDERAL RULES OF EVIDENCE.

F.R.Evid. 201. Judicial Notice of Adjudicative Facts.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

***

F.R.Evid. 901. Authenticating or Identifying Evidence.

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

* * *

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

FEDERAL RULES OF BANKRUPTCY PROCEDURE.

The 2006 amendments to F.R.C.P. 26, 34 and 37 were published with extensive committee notes that help explain and interpret the revisions in the rules to address disclosure and production of electronically stored information. Because of space limitations, the committee notes could not be reproduced in these materials, but the reader should take the time to read the notes. Committee notes for the Federal Rules of Civil Procedure are available online at http://www.law.cornell.edu/rules/frcp/.

F.R.Bankr.P. 7026. General Provisions Governing Discovery.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

***

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

* * *

(b) Discovery Scope and Limits.

* * *

(2) Limitations on Frequency and Extent.

* * *

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the

limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

* * *

(f) Conference of the Parties; Planning for Discovery.

***

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

***

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

***

F.R.Bankr.P. 7034. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes.

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

***

(b) Procedure.

(1) Contents of the Request. The request:

***

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections.

***

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

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F.R.Bankr.P. 7037. Failure to Make Discovery: Sanctions.

Rule 37 F.R.Civ.P. applies in adversary proceedings.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.