

The background of the slide is a light gray gradient, decorated with several realistic water droplets of various sizes. Some droplets are at the top, some at the bottom, and some on the right side, creating a clean, scientific aesthetic.

# PERSPECTIVES ON PROPORTIONALITY IN DISCOVERY

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# INTRODUCTION AND ROADMAP

- Discovery mechanisms in bankruptcy
- Applicable ethical rules
- Applicable “Professionalism Expectations”
- Recent FRCP revisions and “Proportionality”
- Real world application and best practices

# DISCOVERY IN BANKRUPTCY

- Dichotomy between bankruptcy-specific and general civil
  - BK: 341 Meeting and Rule 2004 Examinations
  - Civil: Federal Rules of Civil Procedure 26–37, as incorporated
- Focus here is on traditional civil discovery
  - Bankruptcy-specific rules have particular purpose, well understood by practitioners
  - Civil rules less frequently engaged at deep level

# 341 MEETING AND 2004 EXAMINATION

- 11 U.S.C. § 341 Meeting of Creditors/Equity Security Holders
  - Court excluded from the meeting (§ 341(c))
  - Managed by trustee, generally limited scope of inquiry
- Federal Rule of Bankruptcy Procedure 2004
  - Scope is acts, conduct, property, liabilities, or financial condition of debtor; matters affecting administration or right to discharge
  - Frequently described as “fishing expedition,” creditors not taking advantage of broad scope may be deemed not diligent

# FRCP DISCOVERY MECHANISMS

- Discovery covered by Title V of FRCP (Rules 26–37), Rule 45
  - Rule 26 – Mandatory/expert disclosures, discovery conference, duty to supplement disclosures, protective orders
  - Rule 30 – Oral depositions, 30(b)(6) corporate deposition rules
  - Rule 31 – Written-question depositions
  - Rule 32 – Use of depositions in court proceedings
  - Rule 33 – Interrogatories to parties
  - Rule 34 – Document production and entry onto land
  - Rule 35 – Physical and mental examinations
  - Rule 36 – Requests for Admission
  - Rule 37 – Failure to Disclose or Cooperate in Discovery/Motions to Compel
  - Rule 45 – Rule governing subpoenas/third-party discovery
    - Incorporated by Rules 30(a)(1) (non-party deposition), 34(c) (non-party RFP)

# FRCP DISCOVERY ENFORCEMENT

- Discovery enforced by Rule 37/7037 Motions to Compel
  - Rule 37(a)(2) – Proper court is where action is pending for parties; where discovery is taken for non-parties.
  - Rule 37(a)(3) – Governs types of motions to compel; evasive or incomplete answers are same as failure to answer under Rule 37(a)(4)
  - Rule 37(b) – Failure to comply with court order compelling discovery
  - Rule 37(c)(1) – Covers Rule 26(a), (e) disclosures
  - Rule 37(c)(2) – Covers Rule 36 failure to admit
  - Rule 37(d) – Covers wholesale failure to appear at deposition or serve answers to Interrogatories/RFPs; objectionable discovery no excuse without 26(c) motion
  - Rule 37(e) – Covers failure to preserve ESI
  - Rule 37(f) – Covers failure to participate in good-faith in Rule 26(f) conference

# CONTESTED / ADVERSARY DISTINCTION

- Broad scope of 2004 may not be used to overcome limitations applicable to contested matters/adversary proceedings
  - Adversary Proceedings – Defined by Rule 7001, incorporates all Part VII rules (Rules 7001 through 7087)
    - FRBP Rules 7026 through 7037 incorporate FRCP counterparts
    - FRBP Rule 9016 incorporates FRCP 45 for all cases under Code
  - Contested Matters – Non-adversary disputes; limited Part VII rules
    - FRBP 9014(c): Incorporates 7026 through 7037 with exclusions *unless court directs otherwise*: 26(a)(1) (mandatory), 7026(a)(2) (expert); 26(a)(3) (pre-trial); 26(f) (conference)
    - Note 7027 not incorporated but allowance made to perpetuate testimony

# DISCOVERY AND LOCAL RULES/ORDERS

- Limited local rules affecting discovery
  - District Local Rule 5.1 (form of *filed* documents generally)
  - District Local Rule 7.1 (governing motions generally)
    - Rule 7.1(B) – Requirement for conference/certification (24 hr response)
  - District Local Rule 26.1 (general discovery matters)
    - Prohibits general discovery filing except for evidentiary purposes, covers place of depositions, objecting to discovery and motions to compel
  - BK Local Rule 7007-1 (motion practice) – Conference requirements for motions
  - BK Local Rule 7026-1 (motions to compel)
    - Conference requirements, form of motions to compel, deposition policy
  - BK Local Rule 9013-1 (memoranda of law) – sets response deadline
- Only Standing Order #7 expressly covered Rule 26; vacated by AO 11-001.

# APPLICABLE ETHICAL RULES

- Florida Rules Regulating the Bar incorporated
  - Bankr. LR 2090-1.A. Incorporates ND Fla. Loc. R.
  - ND Fla. LR 11.1(G)(1) requires compliance with Florida conduct rules
- Florida includes an online-searchable series of advisory opinions
  - Florida bar department attorneys – informal opinions
  - Bar committee reviews w/ public comment – formal opinions
- Formal opinions persuasive - *Krivanek*, 625 So. 2d 840 (Fla. 1993)
- Courts can reject - *H.B.A. Mgmt, Inc.*, 693 So. 2d 541 (Fla. 1997)
- Generally best source of interpretation are disciplinary proceedings
  - Often only egregious conduct, not matters of nuance or ordinary discovery

# RULES APPLICABLE TO DISCOVERY

- Rule 4-3.1 (Meritorious Claims and Contentions)
  - May not assert or controvert issues without basis that is non-frivolous, including good-faith argument to change/extend law
- Rule 4-3.2 (Expediting Litigation)
  - Must make reasonable efforts to expedite litigation “consistent with the interest of the client”
  - Comments notable – some substantial purpose other than delay
- Rule 4-3.4 (Fairness to Opposing Party and Counsel)
  - (a) Cannot obstruct access to evidence (or otherwise alter/conceal documents)
  - (d) Cannot make frivolous discovery request or intentionally fail to comply with a legally proper discovery request
  - (g)-(h) Cannot threaten sanctions, disciplinary complaints, criminal charges, or litigation to gain a tactical advantage

## APPLICABLE RULES CONTINUED

- Rule 4-4.4 (Respect for Rights of Third Persons)
  - (a) Cannot use means that have “no substantial purpose other than to embarrass, delay, or burden” third parties or knowingly use methods of obtaining information violation others’ rights.
  - (b) Must notify sender of documents/ESI relating to representation of client that lawyer “reasonably should know . . . was inadvertently sent”
- Generally speaking, practice is to treat discovery as matters governed by rules and not as ethics/professionalism issues

# PROFESSIONALISM IN FLORIDA BAR

- Florida Bar Standing Committee on Professionalism created “Professionalism Expectations” approved by BOG Jan. 30, 2015
- Preamble: “Where a Professionalism Expectation is coextensive with a lawyer’s ethical duty, the expectation is stated as an imperative, cast in the terms of ‘must’ or ‘must not.’ Where a Professionalism Expectation is drawn from a professional custom that is not directly provided for in the Rules Regulating The Florida Bar, the expectation is stated as a recommendation of correct action, cast in terms of ‘should’ or ‘should not.’ ”
- Not specifically incorporated by any Federal Rule but reasonable approximation of Federal aspirations

# EXPECTATIONS APPLICABLE TO DISCOVERY

- Expectations are specific applications of 7 overarching principles:
  - Commitment to Equal Justice Under the Law and to the Public Good
  - Honest and Effective Communication
  - Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play
  - Fair and Efficient Administration of Justice
  - Decorum and Courtesy
  - Respect for the Time and Commitments of Others
  - Independence of Judgment

# NON-RULE BASED EXPECTATIONS

- Honest and Effective Communication
  - 2.6 A lawyer should use formal letters or e-mails for legal correspondence and should not use text messages to correspond with a client or opposing counsel unless mutually agreed.
  - 2.7 In drafting a proposed letter of intent, the memorialization of an oral agreement, or a written contract reflecting an agreement reached in concept, a lawyer should draft a document that fairly reflects the agreement of the parties.
  - 2.8 In drafting documents, a lawyer should point out to opposing counsel all changes that the lawyer makes or causes to be made from one draft to another.

# NON-RULE BASED EXPECTATIONS

- Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play
  - 3.3 A lawyer should not unreasonably oppose an adversary's motion.
  - 3.8 A lawyer should only schedule depositions to ascertain relevant facts and not to generate income or harass deponents or opposing counsel.
  - 3.10 A lawyer should not make improper objections in depositions.
  - 3.12 When scheduling depositions, hearings, and other court proceedings, a lawyer should request an amount of time that permits all parties in the case the opportunity to be fully and fairly heard on the matter.
  - 3.13 A lawyer should immediately provide a scheduling notice for a hearing, deposition, or trial to all opposing parties.
  - 3.14 A lawyer should notify opposing parties and subpoenaed witnesses of a cancelled or rescheduled hearing, deposition, or trial.
  - 3.15 During pre-trial disclosure, a lawyer should make a reasonable, good-faith effort to identify witnesses likely to be called to testify.
  - 3.16 During pre-trial disclosure, a lawyer should make a reasonable good-faith effort to identify exhibits to be proffered into evidence.
  - 3.17 A lawyer should not mark on or alter exhibits, charts, graphs, or diagrams without opposing counsel's permission or leave of court.

# NON-RULE BASED EXPECTATIONS

- Fair and Efficient Administration of Justice
  - 4.1 A lawyer should be familiar with the court's administrative orders, local rules, and each judge's published standing orders, practices, and procedures.
  - 4.2 A lawyer should endeavor to achieve the client's lawful objectives as economically and expeditiously as possible.
  - 4.5 A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.
  - 4.8 A lawyer should frame reasonable discovery requests tailored to the matter at hand.
  - 4.9 A lawyer should assure that responses to proper discovery requests are timely, complete, and consistent with the obvious intent of the request. A lawyer should not avoid disclosure unless a legal privilege prevents disclosure.
  - 4.10 A lawyer should not respond to discovery requests in a disorganized, unintelligible, or inappropriate manner, in an attempt to conceal evidence.
  - 4.11 A lawyer should stipulate to all facts and principles of law that are not in dispute and should promptly respond to requests for stipulations of fact or law.
  - 4.18 A lawyer should not use the post-hearing submission of proposed orders as an opportunity to argue or reargue a matter's merits.

# NON-RULE BASED EXPECTATIONS

- Respect for the Time and Commitments of Others
  - 6.1 A lawyer should not impose arbitrary or unreasonable deadlines on others.
  - 6.2 A lawyer should schedule a deposition during a time period sufficient to allow all parties to examine the deponent.
  - 6.3 Unless circumstances compel more expedited scheduling, a lawyer should provide litigants, witnesses, and other affected persons with ample advance notice of hearings, depositions, meetings, and other proceedings, and whenever practical, schedule these events at times convenient for all interested persons.
  - 6.4 A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair, and prompt adjudication.
  - 6.5 A lawyer should promptly agree to a proposed time for a hearing, deposition, meeting or other proceeding or make his or her own counter proposal of time.
  - 6.6 A lawyer should promptly call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal.
  - 6.7 A lawyer should avoid last-minute cancellations of hearings, depositions, meetings, and other proceedings.
  - 6.8 A lawyer should promptly notify the court or tribunal when a scheduled court appearance becomes unnecessary.
  - 6.9 A lawyer should be punctual in attending all court appearances, depositions, meetings, conferences, and other proceedings.

# NON-RULE BASED EXPECTATIONS

- Independence of Judgment

- 7.1 A lawyer should exercise independent judgment and should not be governed by the client's ulterior motives, ill will, or deceit.
- 7.2 A lawyer should counsel a client or prospective client, even with respect to a meritorious claim or defense, about the public and private burdens of pursuing the claim as compared with the benefits to be achieved.
- 7.4 A lawyer should not permit a client's ill will toward an adversary, witness, or tribunal to become that of the lawyer.

# PROPORTIONALITY IN DISCOVERY

- Historical background/development of the rule
  - 1983 Amendments
  - 1990s Amendments
  - 2006 Amendments
    - ESI guidelines developed/Sedona Principles
  - 2010 Duke University Conference
    - Identified key areas of concern in discovery
    - Led to 2015 Amendments

# FEDERAL RULE OF CIVIL PROCEDURE 1

- “These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed **by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.”
- Contrast with FRBP 1001 “These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding”

# FEDERAL RULE OF CIVIL PROCEDURE 26

- Rule 26(b)(1) (Discovery Scope and Limits / Scope in General)
  - Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional** to the needs of the case, considering [1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties' relative access to relevant information, [4] the parties' resources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

# FRCP 26 CONTINUED

- Rule 26(g)(1) (Effect of Signature on Disclosures/Requests)
  - Every disclosure under Rule 26(a)(1) [initial disclosures] or (a)(3) [pretrial disclosures] and every discovery request, response, or objection must be signed by at least one attorney of record in the attorneys own name . . . . By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
    - (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
    - (B) with respect to a discovery request, response, or objection, it is:
      - (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
      - (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
      - (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

# OTHER FRCP DISCOVERY CONSTRAINTS

- Rule 34(b)(1) (Contents of Request for Production)
  - The request:
    - (A) must describe with reasonable particularity each item or category of items to be inspected;
    - (B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and
    - (C) may specify the form or forms in which electronically stored information is to be produced.

# OTHER FRCP DISCOVERY CONSTRAINTS

- Rule 34(b)(2)(B) (Responding to Requests for Production)
  - For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

# OTHER FRCP DISCOVERY CONSTRAINTS

- Rule 34(b)(2)(C) (Objections to Requests for Production)
  - “An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.”
  - Note that Rule 34 does not expressly incorporate waiver of unstated objections as in Rule 33(b)(4) (“Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure”) but similar practice

# OTHER FRCP DISCOVERY CONSTRAINTS

- Rule 37(a)(1) (Motion for an Order Compelling Discovery)
  - *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.
- Similar certification requirements peppered throughout district and bankruptcy local rules
  - BK LR 7007-1.A. (“[C]ounsel for the moving party **shall confer** . . .”).

# REPRESENTATIVE CASE LAW

- *In re Fustolo*, No. 13-12692-JNF, 2015 WL 9595421 (Bankr. D. Mass. Dec. 31, 2015) (rejecting debtor's arguments in a § 727 adversary proceeding that he should not have turn over emails from his AOL account, considering the amount at stake (discharge of \$45 million in debt), finding that the email request was proportional to the needs of the case and was neither irrelevant nor overbroad).
- *In re Adkins Supply, Inc.*, No. 11-10353-RLJ-7, 2016 WL 4055013 (Bankr. N.D. Tex. July 26, 2016) (multiple findings, including that successful resistance to discovery requires specific, well-supported objections; that failure to properly object – including by making general, non-specific objections – will result in a waiver of the objections; and that affidavits or other evidentiary proof can substantiate an objection to a discovery request, such as an objection based on undue burden or expense).

## CASE LAW CONTINUED

- *Marsden v. Nationwide Biweekly Admin., Inc.*, No. 3:14cv00399, 2016 WL 471364 (S.D. Ohio Feb. 8, 2016) (responding party, despite having access to the requested discovery, successfully demonstrated that responding to discovery requests would impose significant burden and expense).
- *Wilmington Trust Co. v. AEP Generating Co.*, No. 2:13-cv-01213, 2016 WL 860693 (S.D. Ohio Mar. 7, 2016) (denying motion to compel ESI, even though responding party had access to the ESI, where responding party demonstrated that locating the information would be unduly burdensome).

# CASE LAW CONTINUED

- *In re Ferrell*, No. 15-10370, 2016 WL 1178439 (Bankr. D. Me. Mar. 23, 2016) (finding that various interrogatories and requests for production were not relevant or proportional to the needs of the case in light of the factors spelled out in Rule 26(b)(1); also discussing relevancy concepts and noting that the onus is on both the court and the parties to secure a secure a just, speedy, and inexpensive determination of every case and proceeding ).
- *Fulton v. Livingston Fin. LLC*, No. C15-0574JLR, 2016 WL 3976558 (W.D. Wash. July 25, 2016) (imposing sanctions against attorney for, among other things, citing cases in his motion to compel that addressed Rule 26 before it was amended and misrepresenting facts).

## CASE LAW CONTINUED

- *Steel Erectors, Inc. v. AIM Steel Int'l, Inc.*, 312 F.R.D. 673 (S.D. Ga. 2016) (discovery into relationship between contractor and its corporate parent was not relevant or proportional to needs of subcontractor's breach of contract claim against contractor, where action involved straightforward breach of contract claims, and there was no indication that the corporate parent played any role in alleged breaches).
- *Oracle America, Inc. v. Google, Inc.*, No. 10-cv-03561-WHA (DMR), 2015 WL 7775243, at \*2 (N.D. Cal. Dec. 3, 2015) (noting parties' failure to address the Rule 26 proportionality factors and as a result the court would have to "make its best judgment based on the limited information before it").

# OPEN DISCUSSION/CONCLUSION

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