This article is the first in a series of articles about electronic discovery in bankruptcy. The first article covered the basics of electronic discovery, including the rules and resources. The second article discussed the discovery of information found on social media sites, such as Facebook, YouTube, and LinkedIn, and how these sites can be rich sources of evidence for bankruptcy cases. The third article discussed the application of electronic discovery to bankruptcy practice and examined some recent bankruptcy cases where electronic discovery issues were particularly significant. This final article will review recent developments in electronic discovery and discuss the lessons that can be learned from these examples.
Introduction

There are many reasons why an electronic discovery process may create risks that result in sanctions for attorneys and clients as well as violations of an attorney’s ethical responsibilities. The complexity of electronic discovery has been described in the previous articles in this series. However, a number of contributing factors are important to remember. More people are generating and saving information at all stages of a matter, rather than a single archived paper file of final signed documents and memoranda. Over 99 percent of information is now in digital form and nearly 70 percent of this information may never be reduced to paper (hard copy) form. Data is now created in a variety of formats, such as word processing documents, spreadsheets, databases, text messages, digital images, audio, video and websites, and it is stored on a variety of media, from hard drives and laptops to mobile devices, flash drives, voicemail, email, cell phones, scanners, copiers, CDs, DVDs and “black boxes” incorporated into airplanes and automobiles. New forms of information technology, such as social media, challenge attorneys, bankruptcy trustees and judges to consider current and potential future formats of electronically stored information (ESI), all of the places where it might be located and all of the parties who may have access to this ESI. The preservation and handling of metadata must be done with considerable care, especially since most courts now deem native file format with intact metadata as being the expected format for production. Since many parties to litigation are aware that “deleted” data does not mean that the data is truly gone, recent cases suggest that some parties are taking extreme measures to destroy relevant evidence, resulting in significant sanctions, especially when there is gross negligence, bad faith or intentional misconduct in the electronic discovery process that goes unchecked by the party’s attorney. Bankruptcy trustees will want to take particular note of some of the tactics taken to remove or destroy ESI that might have otherwise revealed hidden assets or income or the true nature of a debtor’s financial transactions.

The inadvertent production of material that could have and should have been protected under attorney-client privilege presents a considerable risk, due to the sheer volume of ESI to be collected, reviewed and produced and the short timelines for completing the electronic discovery process. Moreover, a number of cases and a recent ABA Formal Opinion 11-459 note that the attorney-client privilege can be waived when third-parties have access to email messages, most commonly in situations where the employee uses an employer-provided email system to communicate with counsel or where family members share email accounts or are allowed to read each other’s email messages. Technology-savvy judges are no longer willing to overlook even inadvertent destruction or alteration of ESI and will impose sanctions on both clients and their attorneys for mishandling ESI as it flows through the stages of an electronic discovery process. It is important to remember that the duty to preserve potentially relevant ESI begins when litigation is reasonably anticipated, not when official legal notice is received.

Current Technologies for Electronic Discovery

Fortunately, technology may be able to assist with some of the most expensive and labor-intensive steps in electronic discovery, especially the steps that currently require a human’s review and that may be the most ripe for errors to be made that would result in sanctions. Many corporations now appreciate that there is a lifecycle to information and are embracing their information as an asset that must be managed properly, from its creation to its timely and appropriate destruction. Several vendors now offer full-service electronic discovery services, often paired with broader information management and data recovery tools. For example, Kroll Ontrack, whose website indicates that it has been a proven electronic discovery leader for over 25 years, offers a wide range of tools and technologies for many stages of the electronic discovery process, such as case management technology, data identification, expert testimony, early data assessment technology, online review technology, intelligent review technology, filtering and searching and audio discovery. Kroll Ontrack also offers electronic discovery processing using cloud computing with its Verve product. Among their other services are data mapping, consulting on records retention, email management for Exchange, content management for SharePoint, data migration and media conversion and data erasure services and verification. Kroll Ontrack also offers data recovery services for a wide variety of kinds of technology, including laptops, hard drives, databases, tapes, email, mobile devices, emails and digital photographs. Other electronic discovery service providers are Clearwell Systems, which is now part of Symantec, eDiscovery Solutions Group, Notivis Data, formerly Discover-e and FTI Technology. Another interesting development in electronic discovery is the extent to which it is merging with litigation support services to provide more full-service suites of technologies to law firms. For example, Summation, traditionally one of the most popular litigation support products, is now part of AccessData. AccessData offers a wide variety of services for computer and network forensics, electronic discovery collection and preservation, processing and early case assessment, augmented attorney review, automated document production and data storage and delivery solutions. In addition, an article in the ABA Journal indicates that because quality electronic discovery software is now available, corporations may be willing to purchase this software and bring some of the electronic discovery process in-house for greater savings and better control over the process.

As the electronic discovery industry matures, not only will established vendors expand and enhance their offering, but new

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companies will enter the market, especially companies that can harness the power of new technologies to reduce the expensive, labor-intensive and risky human processes, especially the process of reviewing documents. One company that has received considerable attention is Valora Technologies, Inc., which was nominated for the Smaller Business Association of New England (SBANE) 2012 New England Innovation Awards for providing innovation to the process of legal document indexing, analysis and review.14 In selecting what electronic discovery functions to outsource and the extent to which these will be accomplished by humans or computers, it is important to understand the types of approaches that are available for automated review and predictive coding.15 Judges are also carefully evaluating whether to allow the use of these technologies. For example, in *Da Silva Moore v. Publicis Groupe & MSL Group*, Magistrate Judge Peck issued a robust written opinion wherein he approved the parties’ agreement for computer-assisted review.16 The case is described as being the first where the court has approved the use of computer-assisted review.17 The court cautioned that this “does not mean computer-assisted review must be used in all cases or that the exact ESI protocol approved here will be appropriate in all future cases that utilize computer assisted review.”18 More recently, District Court Judge Andrew L. Carter, Jr. denied the objections of plaintiffs and upheld Magistrate Judge Peck’s orders approving defendant’s use of predictive coding to review its own documents and adopting defendant’s proposed protocol.19 Likewise, in *Global Aerospace, Inc. v. Landow Aviation, L.P.*, a judge in Virginia state court granted a request to allow defendants to use predictive coding, subject to the objections of plaintiffs once they obtained the results of the production from defendants.20 The defendants’ motion in the *Global Aerospace* case is an extensive discussion of the methodology used and the validity of predictive coding.

In terms of ethical issues and sanctions, it is important to note that even though many of the products and services provided by vendors may be excellent, the attorney still bears the burden for continued oversight and control of the electronic discovery process. Not only is this clearly articulated in *Zubulake v. UBS Warburg*, but it is also reflected in the ABA Model Rules of Professional Conduct, as incorporated into each state’s disciplinary rules.21 The attorney’s responsibility for being competent in all matters related to the representation is framed by Model Rule 1.1: “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.”22 Comment 6 states that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”23 The broad interpretation of the language “and its practice” encompasses the ability to implement and use appropriate technology and to supervise others who are using technology, whether they are regular employees of the law firm or outside third-party vendors or contractors.

The duty to supervise is clearly articulated in Model Rules 5.1, 5.2 and 5.3, but especially Model Rule 5.3, which covers nonlawyers and states that “(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”24 Comment 1 gives an indication of the scope of the lawyer’s supervisory obligations over nonlawyers, including independent contractors or vendors who might be assisting with or providing technology support for many facets of an electronic discovery process:

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.25

In other words, a lawyer cannot avoid violations of the Rules by “hiring away” any potential ethical breaches in electronic discovery to third parties; the lawyer has ultimate responsibility for the integrity of the process. Attorneys, clients, bankruptcy trustees and vendors must understand their roles as well as the roles of other participants in the electronic discovery process. It is also important that vendors not assume the role of a legal advisor because of the risk of crossing into the realm of the unauthorized practice of law. Also embedded in Comment 1 is a caution about the special care needed with privileged information.

Because of the ethical issues created by new technologies, the American Bar Association has been engaged in a robust review of many of the Model Rules through the three-year efforts of its ABA Commission on Ethics 20/20.26 Several of these proposals concern matters that are important in the context of electronic discovery, including Technology and Confidentiality, including the lawyer’s obligations and responsibilities in handling the storage and security of clients’ confidential data. Outsourcing, which addresses the ethical responsibilities associated with the outsourcing of legal and law-related work both domestically and offshore, and Model Rule 1.1 (Duty of Confidentiality), which addresses the disclosure of conflicts of interests, particularly in the context of detecting conflicts of interests. Interestingly, the proposal for Model Rule 1.1 includes a recommendation to revise Comment 6 so that it would read “[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of the changes in law and its practice, including the benefits and risks associated with technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”27 Another small, but very significant revision is proposed for Model Rule 5.3, which is to change the title of this Rule from Responsibilities Regarding Nonlawyer Assistants to Responsibilities Regarding Nonlawyer Assistance, with new Comments 3 and 4 covering non-lawyers outside the firm. This proposal also recommends revising Model Rule 1.1 on Competence by adding two new Comments (Comment 6 and 7) covering the retention of or contracting with lawyers from out-

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side the firm. Even though the deadline for feedback on these proposals has expired, attorneys, judges and bankruptcy trustees are advised to review the recommended changes to the Rules and Comments as well as the draft reports for a good indication of what the expanded ethical duties for attorneys might be related to electronic discovery.

Using the EDRM to Identify Ethical Issues and Risks of Sanctions

A helpful approach to thinking about the complexity and iterative nature of the electronic discovery process is to consider the Electronic Discovery Reference Model (EDRM). The EDRM is also useful in discerning when and how ethical issues and the risks of sanctions may present themselves at various stages of an electronic discovery process.

For example, note that as we move through the process, the volume of information that needs to be collected and preserved is reduced as the relevance of the information that will be produced increases. This suggests the need for the attorney to be proactive at the outset of the litigation to be sure that all potentially relevant information that the client might have is being properly preserved and to be thoroughly informed about that client’s information technology. At the same time, the attorney must make timely, thorough and appropriate requests for electronically stored information in specified formats from the opposing party. Note as well that the duty to preserve begins when litigation is reasonably anticipated. Another step in the EDRM where ethical issues may occur is in the review of electronically stored information prior to production to the opposing party. Because of the voluminous amounts of information that need to be handled in various types of file formats, there is a clear danger that information that could and should be protected under attorney-client privilege or another doctrine related to confidentiality will slip through and be produced. Although there are rules related to inadvertent production, they should not be relied on as an excuse for careless handling or review of electronically stored information. Another ethical issue may be in the selection and oversight of an electronic discovery vendor or computer forensics expert that may be assisting in the collection, processing or analysis steps of the process.

Sanctions for Electronic Discovery Violations

According to Weiss, “[t]he discovery sanctions have reached an all-time high after three decades of litigation over alleged discovery wrongdoing and lawyers are increasingly being targeted.” The study, conducted by King & Spaulding, identified 30 cases where lawyers were sanctioned for electronic discovery violations. “The King & Spalding lawyers analyzed 401 cases before 2010 in which sanctions were sought and found 230 sanctions awarded, including often severe sanctions of case dismissals, adverse jury instructions and significant money awards. Sanctions of more than $5 million were ordered in five cases, and sanctions of $1 million or more were awarded in four others. Defendants were sanctioned for e-discovery violations nearly three times more often than plaintiffs. When sanctions were awarded, the most common misconduct was failure to preserve electronic evidence, followed by failure to produce and delay in production.”

A number of authors have expressed concerns about the various requirements for handling electronically stored information (ESI) and the increasing risk of sanctions. For example, Reissner characterizes the current situation as “running just to stand still” and cites new formats (texting, Facebook, Twitter, FourSquare, LinkedIn), the introduction of new laws and regulations for data privacy and security and consequent liability for improper processing, storage and transfer of data, and the increasing sophistication of judges on ESI as presenting special challenges. He notes that sanctions are being levied, not just for preservation and collection failures, but also for errors in workflow and data processing. He advises attorneys that the bar of competence has been raised, including the responsibility to supervise, and states that “[s]imply delegating discovery responsibilities to a litigation support person or an outside vendor will not diminish the attorney’s liability for substandard results.” Among the solutions he suggests are early case assessment, flexible technologies in document review, and a proactive model of capturing and identifying data at the time of creation that will include centralized storage and elimination of duplicates. However, he concludes his article by noting that “[o]ne trend that will certainly continue to gain traction is the potential exposure and liability for both litigant and counsel who fail to pay heed to the duties of the discovery process.” He also notes that relying on people with inadequate skills or using software that is not appropriate for the purpose will not be excusable.

Treese provides a number of excellent suggestions in his article on managing the risks of electronic discovery. After describing the increasing amount of electronically stored information and the challenges of managing it, he discusses why gaps in the adoption of technology by attorneys have resulted in electronic
discovery-related issues appearing consistently in allegations of attorney malpractice.\(^7\) He notes that it is time for attorneys to get the skills they need to meet the challenges of electronic discovery and that this is likely beyond the scope of CLEs and short seminars.\(^8\) Good news is articulated in Stella’s article, wherein he suggests that “[i]t is possible to reduce ESI anxiety by effectively managing discovery: being proactive in defining the scope, understanding preservation obligations and protections, and taking reasonable steps calculated to protect potentially relevant information (PRI).\(^9\) He notes that the best way to manage the risks of sanctions associated with electronic discovery is cooperation to define its scope.\(^40\)

**Review of Recent Cases**

A quick search of the Electronic Discovery Law website provided by K&L Gates can be helpful in discerning trends in how courts are dealing with spoliation and the sanctions that are being imposed.\(^4\) A simple search using the database’s checkbox for “spoliation” on April 27, 2012, in the law firm’s database yielded 641 cases. Likewise, a search using the checkbox “motion for sanctions” retrieved 808 cases. Narrowing this down to just cases 2012 where there was a motion for sanctions illustrates that electronic discovery processes are required in a broad spectrum of legal matters and that the duty to search for and preserve electronically stored information evidence will encompass many kinds of formats, including paper. These cases concern employment litigation, unconstitutional seizure and use of excessive force, sexual harassment, reverse discrimination, patent infringement, breach of employment contract, wrongful arrest, antitrust, oil spill, slip and fall, copyright infringement, the death of a defendant while in jail, breach of contract, FLSA class action and an automobile accident. In these cases, there were disputes over metadata, email messages, digital photographs, notes maintained on work and home computers, log messages, USB devices, video surveillance tapes, ESI from hard drives and backup tapes, computer modeling data and results and even hard copy originals of a calendar and hard copies of doctor’s notes. It is important to keep in mind all of the places where relevant ESI may be stored, including devices that might not even fall under the category of information technology. For example, in Vanliner Ins. Co. v. ABF Freight Syst., Inc., the information requested was engine-related data from an Electronic Control Module, which included the speed of the tractor/trailer and the rotation of RPMs of the engine.\(^44\) The following representative sample of case summaries from the K&L Gates website illuminates the analysis that courts use in deciding whether to order sanctions, especially when there is culpability by a party, and the range and severity of sanctions that courts are willing to impose:

- **For Key Employees’ Bad Faith, Intentional Spoliation, Court Imposes Adverse Inference and Monetary Sanctions.** *E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc.*, No. 3:09cv58, 2011 WL 2966862 (E.D. Va. July 21, 2011). In addition to the adverse inference instruction, the court ordered that the defendant would be responsible for the plaintiff’s attorney fees, expenses and costs related to the motion. The court held that a default judgment was not appropriate because the defendant had attempted to place two litigation holds and many deleted items were recoverable from of the preservation of backup tapes. The court noted that defendant’s spoliation was a violation of the duty owed to the court and the judicial process.\(^45\)
- **Plaintiff Sanctioned for Burning Personal Computer.** *Evans v. Mobile Cnty. Health Dept.*, No. CA 10-06000-WS-C, 2012 WL 206541 (S.D. Ala. Jan. 24, 2012). In this case, the court determined that the plaintiff had spoliated evidence in bad faith, but because defendant was still able to defend itself, the court ordered an adverse inference instruction to be given at trial rather than the more severe sanction of dismissal, and ordered the plaintiff to pay the fees and costs associated with defendant’s motion for sanctions.\(^44\)
- **Court Imposes Sanctions for Failure to Conduct Reasonable Inquiry and Late Production.** *In re Delta/AirTran Baggage Fee Antitrust Litig.*, — F. Supp. 2d —, 2012 WL 360509 (N.D. Ga. Feb. 3, 2012). In this case, the defendant discovered and produced an additional 60,000 pages after repeated assertion that all responsive documents had been produced. The court looked to Rule 26(g) and Rule 37(c)(1) of the Federal Rules of Civil Procedure to decide the appropriateness of sanctions. Based on its analysis of the Rules, with particular focus on the defendant’s lack of diligence and its failure to correct misstatements, the court re-opened discovery and ordered the defendant to pay plaintiffs’ reasonable expenses and attorney fees that were the result of defendant’s failures, including the cost of the necessary motions and extended discovery period.\(^35\)
  - “[T]hrowing the Laptop Off a Building; Running Over the Laptop with a Vehicle; and Stating ‘If This Gets Us into Trouble, I Hope We’re Prison Buddies,’ Unquestionably Demonstrate Bad Faith.” *Daynight, LLC v. Mobilight, Inc.*, 248 F.3d 1010 (Utah Ct. App. 2011). The quotation from the party faced with sanctions presents a vivid image of what he will do with the laptop, but also indicates the extent to which a party may flagrantly ignore the duty to preserve relevant ESI. This case is an appeal of the district court’s decision to enter a default judgment against a third-party defendant for destroying evidence. The Court of Appeals analyzed Utah Rules of Civil Procedure 37(b)(2), 37(g) and 37(e), but was particularly taken by the party’s specific threats to intentionally destroy the laptop regardless of the consequences, and upheld the sanction, finding no abuse of discretion in light of the party’s behavior.\(^46\)
- **Court Upholds Sanctions against “International Man of Mystery” citing Affirmative Actions to Destroy Relevant Documents in Unallocated Space.** *Genger v. TR Investors, LLC*, No. 592,2010, 2011 WL 2802832 (Del. July 18, 2011). This case is an appeal of sanctions against the defendant for wiping the unallocated space on his company’s computer system to remove or segregate what he considered very personal files concerning his government security work, even though there was a court order prohibiting this destruction. The court found the defendant in contempt and that intentional spoliation had occurred. The court’s order for the payment of attorney’s fees and expenses related to the motion of sanctions was upheld by the Supreme Court of Delaware, which noted that despite knowing that he had a duty to preserve documents, the defendant intentionally took affirmative action to destroy several relevant documents on his work computer.\(^6\)
- **Court Orders Monetary Sanction of $250,000, that Defendant Provide the Court’s Order to Plaintiffs in All Cases,**
and that Defendant File the Order in Every Case for 5 Years. Green v. Blitz U.S.A., No. 2:07-CV-372 (TJW), 2011 WI 806011 (E.D. Texas Mar. 1, 2011). The amount of the monetary sanction in this case should serve as a warning to clients and attorneys. The court ordered defendant to pay $250,000 to the plaintiff in civil contempt sanctions as well as to provide a copy of the court’s order to plaintiffs in every lawsuit against it during the past two years and in every case where defendant is involved for the next five years, finding that among the defendant’s discovery abuses were failing to disclose relevant evidence and to issue a litigation hold. An interesting facet of the case is that apparently one employee was given responsibility for searching and collecting documents who was not computer literate, did not conduct even a simple keyword search and did not issue a litigation hold. Thus, this case illustrates the wisdom of hiring a high-quality computer forensics expert to conduct the investigation and preserve ESI, even though expensive, rather than turning to an inexperienced internal IT person, who may also face a conflict between the duty to preserve and produce ESI and the fear of harming the company where he or she is employed.

From these cases, it is clear that courts have a wide variety of sanctions that can be assessed for mishandling of the electronic discovery process and that courts have considerable discretion in imposing these sanctions. Moreover, courts are quite willing to order significant sanctions when the conduct of parties is especially egregious, including intentional destruction of ESI and bad faith in the collection, preservation and production of ESI that is potentially relevant in a case.

Conclusions

This four-part series of articles was intended to inform attorneys, bankruptcy trustees and judges about the burgeoning area of the law known as electronic discovery. The modern era of electronic discovery can be dated from 2006, with the revisions to the Federal Rules of Civil Procedure, although these revisions were anticipated in the series of decisions in the Zubulake v. UBS Warburg case. After more than five years of experience in the world of electronic discovery, it is clear that courts have become much more comfortable with technology and the proper handling of ESI. Thus, courts are more willing to assess significant sanctions for failures in the electronic discovery process. The development of new technologies continues to present challenges for electronic discovery, as clients and attorneys grapple with how to locate, preserve, review and produce new forms of information and consider an increasing spectrum of large and small devices where this information may be stored. On the other hand, new technologies offer great promise at various steps in the electronic discovery process as well, particularly in streamlining and reducing the risks of the steps that are the most costly and most susceptible to human error.

Footnotes:
1 American Bar Association, Formal Opinion 11-459 Duty to Protect the Confidentiality of E-Mail Communications with One’s Client, August 4, 2011.
16 Id. at 25.
17 Id.
22 Id.
27 Id.
30 Id.
32 Id. at 97.
33 Id.
34 Id. at 99.
35 Id.
37 Id. at 43.
38 Id.
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event, please visit www.bike-4-life.com. 

Darron Meares of Meares Auction Group has been elected Vice President of the South Carolina Auctioneers Association. Darron has served on the Board of Directors for the Association as well as its Technology Committee and Membership Committee. He is the COO of the Meares Auction Group and is a presenter/educator for the National Auctioneers Association, Industrial Auctioneers Association, NABT and various other state auctioneering associations. He can be reached at 864. 444.5361 or email at darron.meares@mearesauctions.com.

Michael Dacquisto, chapter 7 trustee in northern California, is running for Congress in California’s new first district. You can check out his website at www.votedaquisto.com.

Michael says he will not take donations and intends to be a true citizen legislator. By the time this edition of NABTalk comes out the primary results will be in. His theme is how to deal with debt and the deficit, and he believes his background as a bankruptcy trustee gives him unique insight and qualifications to help solve this problem.

In Memorium: Arthur Liebersohn

Arthur Liebersohn, 61, of Mount Airy, Pennsylvania, passed away on February 29 of complications from a stroke at Thomas Jefferson University Hospital.

Arthur was a bankruptcy attorney, frequent Consumer Party candidate for public office, and since 1986 a chapter 7 panel trustee in the Eastern District of Pennsylvania. A native of Chevy Chase, Maryland, Arthur earned a bachelor’s degree from the University of Wisconsin in 1973. After graduating from the University of Pennsylvania School of Law in 1976, he joined the Consumer Education and Protective Association (CEPA) and the Consumer Party. In 1977, he became the Consumer Party candidate for Philadelphia district attorney. He ran again for district attorney in 1981, and was the Consumer Party candidate for mayor in 1979 and 1983 and for state attorney general in 1984. “Arthur was extraordinarily idealistic and very progressive,” said former Pennsylvania Gov. Ed Rendell, who won the elections for district attorney in 1977 and 1981. “He was a fighter for what he believed in. He had a great sense of humor. He wasn’t pompous and didn’t take himself too seriously, like most politicians.”

Board member Dwayne Murray recently represented NABT at the 24th annual California Bankruptcy Forum. The educational seminars were staffed with judges, lawyers, and legal scholars from the California bankruptcy community. NABT Associate Board members Richard Arblock and George Adams were also in attendance. In addition, the NABT booth was staffed by NABT Executive Liaison, Nancy Cooper, who, along with Dwayne, educated potential members to the benefits of NABT membership and promoted the upcoming September Colorado Springs Convention.

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37 Id. at 45.
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