

Ethics: The Old and the New

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ETHICS AND SOCIAL NETWORKING

Presented by Stuart A. Gold

Issues relating to the Lawyer's or Trustee's and their Assistants' Facebook page

- o MRPC 5.3, 6.5
- o NABT Canon of Ethics 25 and 32-37

Secret Facebook Investigations – by Attorney, Trustee or Assistant

MRPC 8.4

NABT Canon of Ethics

Undisclosed/Destruction/Hidden Facebook page

MRPC 1.2, 1.7

18 USC §§152 and 1519

Investigations of Digital Assets

11 USC §541

11 USC §526 (a)(2)

11 USC §707(b)(4)(C)(i)

11 USC §707 (b)(4)(D)

F.R. Bankr. P. 9011(b)(3)

Unauthorized Practice of Law

Blogs

State Lines

Unintended Creation of an Attorney Client relationship

Not what attorney expected but based on client's expectations

Improper Solicitation

There is no Social Media Privilege – sites, blogs, websites – all fair game

**Issues relating to the Lawyer's or Trustee's and their Assistants'
Facebook Page –**

May an assistant of an attorney or trustee comment on the purported lack of another attorney's qualifications, on their Facebook page?

May an attorney, trustee or assistant 'friend' a debtor or witness to gain access to their Facebook page?

What if the attorney does not know of the assistant's activities?

May an attorney advise a client to delete or modify a Facebook page?

Is an attorney's failure to investigate the contents of a debtor's Facebook page, prior to filing the bankruptcy petition, a breach of that attorney's duty?

May a trustee demand the turnover of a debtor's password to gain access to the debtor's Facebook page?

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rule: 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed by, retained by, or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- * (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; and
- * (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with knowledge of the relevant facts and the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed or has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment: 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 should 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.

As does Rule 3.8, this rule may in certain situations impose on a prosecutor an obligation to make reasonable efforts to assure that a defendant's rights are protected. Of course, not all of the individuals who might encroach upon those rights are under the control of the prosecutor, but where this rule applies, the prosecutor must take reasonable and appropriate steps to assure that the defendant's rights are protected.

persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

The restriction on lawyer participation with legal services and lawyer referral service organizations to those that file their plans with the State Bar of Michigan is intended to facilitate the establishment of a single, central repository of all such organizations in Michigan and of the terms and conditions under which they operate. The existence of that repository would make it possible for the State Bar of Michigan annually to prepare and make publicly available a directory of legal services and lawyer referral service organizations in Michigan. Absent such a central repository, reliable information concerning the status of all such organizations might not be available.

The 1990 amendment to MRPC 6.3(b) was made at the request of the State Bar of Michigan.

Rule: 6.4 Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or administration of the law notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment: Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also the comment to Rule 1.2. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

 **Rule: 6.5 Professional Conduct**

(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

(b) A lawyer serving as an adjudicative officer shall, without regard to a person's race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.

Comment:

DUTIES OF THE LAWYER

A lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality. It follows that such a professional must treat clients and third persons with courtesy and respect. For many citizens, contact with a lawyer is the first or only contact with the legal system. Respect for law and for legal institutions is diminished whenever a lawyer neglects the obligation to treat persons properly. It is increased when the obligation is met.

A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly rude. A lawyer's professional judgment must be employed here with care and discretion.

A lawyer must take particular care to avoid words or actions that appear to be improperly based upon a person's race, gender, or other protected personal characteristic. Legal institutions, and those who serve them, should take leadership roles in assuring equal treatment for all.

A judge must act "[a]t all times" in a manner that promotes public confidence in the impartiality of the judiciary. Canon 2(B) of the Code of Judicial Conduct. See also Canon 5. By contrast, a lawyer's private conduct is largely beyond the scope of these rules. See Rule 8.4. However, a lawyer's private conduct should not cast doubt on the lawyer's commitment to equal justice under law.



A supervisory lawyer should make every reasonable effort to ensure that subordinate lawyers and ~~nonlawyer assistants~~, as well as other agents, avoid discourteous or disrespectful behavior toward persons involved in the legal process. Further, a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm on the basis of race, gender, or other protected personal characteristic. See Rules 5.1 and 5.3.

DUTIES OF ADJUDICATIVE OFFICERS

The duties of an adjudicative officer are included in these rules, since many legislatively created adjudicative positions, such as administrative hearing officer, are not covered by the Code of Judicial Conduct. For parallel provisions for judges, see the Code of Judicial Conduct.

misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests. Because confidentiality is essential to encourage lawyers and judges to seek treatment, information received in the course of providing counseling services in the State Bar's lawyers and judges assistance program is exempt from the reporting requirement to the extent it would be protected under Rule 1.6 if it were a communication between lawyer and client.


If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Rule: 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

 (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct that is prejudicial to the administration of justice;

(d) state or imply an ability to influence improperly a government agency or official; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

Comment: Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of wilful failure to file an income tax return. However, some kinds of offenses carry no such implication.

Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of

repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning a good-faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law. See also Rule 3.4(c).

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and such as officer, director, or manager of a corporation or other organization.

Rule: 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct; a lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment:

DISCIPLINARY AUTHORITY.

It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. The fact that a lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer in civil matters.

preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.


MAINTAINING COMPETENCE


To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Rule: 1.2 Scope of Representation

(a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

 (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

 (d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment:

SCOPE OF REPRESENTATION

Both the lawyer and the client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

INDEPENDENCE FROM CLIENT'S VIEWS OR ACTIVITIES

Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

SERVICES LIMITED IN OBJECTIVES OR MEANS

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal-aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

ILLEGAL, FRAUDULENT AND PROHIBITED TRANSACTIONS

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is illegal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in illegal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which an illegal act or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is illegal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for

example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Rule: 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Rule: 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.

determining a lawyer's fee, for example, in representation of an executor or administrator, of a class, or of a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Rule: 1.6 Confidentiality of Information

(a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:

- (1) reveal a confidence or secret of a client;
- (2) use a confidence or secret of a client to the disadvantage of the client; or
- (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

~~X~~ (c) A lawyer may reveal:

- (1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
- (2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;
- (3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;
- ~~X~~ (4) the intention of a client to commit a crime and the information necessary to prevent the crime; and
- (5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

Comment: The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client, but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and

correct. The common law recognizes that the client's confidences must be protected from disclosure. Upon the basis of experience, lawyers know that almost all clients follow the advice given and that the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the client-lawyer privilege (which includes the work-product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The client-lawyer privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies to confidences and secrets as defined in the rule. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also *Scope, ante*, p M 1-18.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

AUTHORIZED DISCLOSURE

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or, in negotiation, by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers, or unless the disclosure would breach a screen erected within the firm in accordance with Rules 1.10(b), 1.11(a), or 1.12(c).

DISCLOSURE ADVERSE TO CLIENT

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. To the extent a lawyer is required or permitted to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission

of deliberately wrongful acts, the public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Generally speaking, information relating to the representation must be kept confidential as stated in paragraph (b). However, when the client is or will be engaged in criminal conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may appropriately yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of that conduct. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is illegal or fraudulent. See Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in illegal or fraudulent conduct. The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer's own representations.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (c)(3) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification. However, the constitutional rights of defendants in criminal cases may limit the extent to which counsel for a defendant may correct a misrepresentation that is based on information provided by the client. See comment to Rule 3.3.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. Inaction by the lawyer is not a violation of Rule 1.2(c), except in the limited circumstances where failure to act constitutes assisting the client. See comment to Rule 1.2(c). However, the lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime. If the prospective crime is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, a lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (c)(4), the lawyer has professional discretion to reveal information in order to prevent a client's criminal act.

It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the lawyer knows is intended by the client. However, it is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a

change of mind. To require disclosure when the client intends such an act, at the risk of professional discipline if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma.

The lawyer's exercise of discretion requires consideration of such factors as magnitude, proximity, and likelihood of the contemplated wrong; the nature of the lawyer's relationship with the client and with those who might be injured by the client; the lawyer's own involvement in the transaction; and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make a disclosure permitted by paragraph (c) does not violate this rule.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer should make an inquiry within the organization as indicated in Rule 1.13(b).

Paragraph (c)(3) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

WITHDRAWAL

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

DISPUTE CONCERNING LAWYER'S CONDUCT

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity or other misconduct has been made. Paragraph (c)(5) does not require the lawyer to await the commencement of an action or proceeding that charges complicity or other misconduct, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the

information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.

A lawyer entitled to a fee is permitted by paragraph (c)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

DISCLOSURES OTHERWISE REQUIRED OR AUTHORIZED

The scope of the client-lawyer privilege is a question of law. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (b)(1) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

FORMER CLIENT

The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

Rule: 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Comment:

LOYALTY TO A CLIENT

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to Rule 1.3 and *Scope, ante*, p M 1-18.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

CONSULTATION AND CONSENT

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot

properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

LAWYER'S INTERESTS

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

CONFLICTS IN LITIGATION

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

INTEREST OF PERSON PAYING FOR A LAWYER'S SERVICE

A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its

insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

OTHER CONFLICT SITUATIONS

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be a question of law. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

CONFLICT CHARGED BY AN OPPOSING PARTY

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. See MCR 6.101(C)(4). Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See *Scope, ante*, p M 1-18.

Chapter 7 Trustees – Ethical Considerations

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Presentation to the Bankruptcy Section of the Minnesota State Bar Association

Debtor's counsel may be surprised to learn the extent to which Chapter 7 trustees have formally considered their ethical obligations in this role above and beyond their ethical responsibilities within their particular professions. Most debtors' counsel know that not every trustee is an attorney. In fact, it is not required for one to be an attorney in order to be appointed as a chapter 7 trustee. Rather, a college degree or a satisfactory level of experience is all that's legally required.

The National Association of Bankruptcy Trustees has adopted a Canon of Ethics, which is reproduced below in its entirety.

NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

CHAPTER 7 TRUSTEE CANON OF ETHICS

A Chapter 7 Trustee is committed to excellence in the administration of bankruptcy cases and to carry out all duties with the utmost integrity, diligence, and professionalism. Parties are entitled to service that adheres to the highest standards of professional, moral, and ethical conduct. As a fiduciary, a Trustee occupies a significant position of trust and responsibility and is accountable to all in the bankruptcy system and the public at large.

Integrity of the Bankruptcy System

1. A Trustee shall at all times promote and defend the integrity of the bankruptcy system.

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DETROIT CONSUMER BANKRUPTCY CONFERENCE

2. A Trustee shall exercise independent fiduciary judgment in the administration of any bankruptcy case.
3. A Trustee shall comply with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the local rules and orders of the districts in which they practice, the Handbook for Chapter Trustees published by the Executive Office for United States Trustees, and state law as required.
4. A Trustee shall exercise due care to preserve and protect the interests of all parties.
5. A Trustee shall encourage debtors, creditors, attorneys, other professionals, petition preparers, and other participants in the bankruptcy process to diligently perform their bankruptcy and professional obligations.
6. A Trustee who observes conduct by debtors, creditors, attorneys, other professionals, petition preparers, or parties in interest that is fraudulent, abusive, or criminal, shall report any such conduct to the appropriate authorities.

Professional Conduct as Trustee

7. A Trustee shall not accept or continue an appointment in a case if the Trustee is not competent to perform the required duties.
8. A Trustee shall act with full candor to the court and shall not make any knowingly false statement.
9. A Trustee shall act with good faith and fair dealing.
10. A Trustee shall perform all responsibilities diligently.
11. A Trustee shall investigate, identify, and administer assets in a timely and thorough manner to maximize the value of the estate.
12. A Trustee shall conduct a meaningful meeting of creditors with a decorum that conveys the significance of the proceedings, dignity and respect for the participants, and sensitivity to the diversity of the participants.
13. A Trustee shall exercise due care regarding property in the Trustee's control.
14. A Trustee shall make decisions that are in the best interests of the estate.
15. A Trustee shall not have ex parte contacts with the judge concerning matters affecting a particular case or proceeding except as permitted by law.
16. A Trustee may have direct contact with a party represented by an attorney without consent of the attorney, unless prohibited by law.

Disinterestedness and Conflicts

17. A Trustee shall promptly resign from any case in which the Trustee is an insider, creditor, or an equity security holder of the debtor, or in which the Trustee has an interest materially adverse to the bankruptcy estate.

18. A Trustee shall not accept or continue an appointment that may adversely affect representation of a bankruptcy estate without resolving all adverse effects.

19. A Trustee shall not sell or transfer estate property to the Trustee, the Trustee's employees, or any parties with whom the Trustee has a connection that might affect or appear to reasonably affect the ability of the Trustee to perform responsibilities in an unbiased manner.

20. A trustee shall only invest funds of a bankruptcy estate in a financial institution approved by the United States Trustee, but not in any financial institution or other investment in which the Trustee has any ownership interest or control.

Administration of Office and Supervision of Employees

21. A Trustee shall maintain and actively participate in an appropriate and comprehensive system of office operations and internal accounting to track case administration and progress, account for all estate property, and generate accurate reports.

22. A Trustee shall have a system in place to timely respond to reasonable inquiries on behalf of debtors, creditors, attorneys, the court, and other interested persons.

23. A Trustee shall have a system in place to screen new cases for lack of disinterestedness and to identify circumstances that arise during the case creating a lack of disinterestedness.

24. A Trustee shall timely file all required reports and shall cooperate with required government audits and examinations.

25. A Trustee shall supervise the work of employees and be responsible for their work product.

Employment of Professionals

26. A Trustee shall employ competent professionals who are disinterested, unless otherwise authorized by law.

27. A Trustee shall supervise the work of employed professionals.

Gifts, Speaking, and Contributions

28. A Trustee shall not receive anything of value if it is intended or offered to influence the official actions of the Trustee in the performance of the Trustee's duties and responsibilities.

29. A Trustee shall not give anything greater than a nominal value to a Judge, employee of the U.S. Trustee program, or employee of the United States Courts.

30. A Trustee may accept reimbursement of expenses and a reasonable honorarium for speaking at educational seminars or conferences.

31. A Trustee may not solicit for charitable or political purposes in any manner resulting in the reasonable perception that it is intended to or would have the effect of influencing the official actions of the Trustee.

Personal Conduct

32. A Trustee shall demonstrate integrity and good character.

33. A Trustee shall display proper temperament.

34. A Trustee shall not violate a disciplinary rule to which the Trustee is subject.

35. A Trustee shall not engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or illegal conduct involving moral turpitude.

36. A Trustee shall act at all times in a manner that promotes public confidence in the bankruptcy system.

37. A Trustee shall be free of prejudice and the appearance of prejudice against any individual entity, or group of individuals or entities.

II. May A Chapter 7 Trustee Directly Contact or Communicate with a Debtor Represented by Counsel?

A Chapter 7 trustee may directly contact or communicate with a Debtor represented by counsel unless that conduct is prohibited by applicable state law regulating the Trustee's profession. At least two state bar ethics advisory opinions support this position. The opinions from the California Bar and the Arizona Bar are directly on point. An opinion from the Utah Bar is generally on point.

While it is permitted for a chapter 7 trustee to directly contact a debtor represented by counsel, it is improper for the chapter 7 trustee to do so once he or she is appointed to represent himself or herself in the matter. It is inadvisable for the trustee to do so when acting as a party in an adversary proceeding or contested matter before the court. However, there is no prohibition from the trustee doing so when acting solely in the role of trustee.

Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Ethics Op. 1989-110

ISSUE:

Is it proper for a bankruptcy trustee, who is a member of the State Bar of California, to communicate directly with parties to the bankruptcy proceeding who are represented by counsel?

DIGEST:

Such communication is not prohibited.

AUTHORITIES INTERPRETED:

Rule 2-100 of the Rules of Professional Conduct of the State Bar of California.

ISSUE

Many individuals appointed as trustees in bankruptcy proceedings are also members of the State Bar. Frequently, the other parties are represented by counsel, and, in some cases, the trustee will retain counsel. Whether the trustee is or is not represented by counsel, he or she often will wish to communicate directly with other parties, e.g., the debtor or particular creditors. We have been asked whether, in the absence of a party's attorney's consent, such communication is proper.

DISCUSSION

Rule 2-100(A) of the Rules of Professional Conduct provides that "[w]hile representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter unless the member has the consent of the other lawyer."

The Discussion following rule 2-100 states:

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. *Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or*

indirectly communicating on his or her own behalf with a represented party. . . .
(Emphasis supplied.)¹

Although a trustee may be an attorney, his or her role as trustee is as the representative of the estate of the debtor - i.e., a party to the proceeding who has the capacity to sue and be sued.² Hence, under the clear language of both the rule and Discussion, the Trustee, as a party, is permitted to communicate directly with other parties to the proceeding.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility or any member of the State Bar.

¹ "[T]he comments contained in the Discussions of the rules . . . are intended to provide guidance for interpreting the rules and practicing in compliance with them." (Rule 1-100(C) of the Rules of Professional Conduct of the State Bar of California.)

² 11 U.S.C. §323.

State Bar of the State of Arizona - Formal Opinions 2003-02

**03-02: Communication with Represented Persons; Bankruptcy Trustee/Ex Parte contact
04/2003**

A lawyer serving as trustee in bankruptcy may directly contact parties in bankruptcy cases who are represented by counsel. The lawyer acting as both the trustee and attorney for the trustee may not have ex parte contact, unless authorized by law to do so.

FACTS

The inquiring attorney is appointed as trustee in bankruptcy cases on a regular basis. Lawyers are often appointed as bankruptcy trustees. Similarly, non-lawyers also are appointed to serve as trustees. Each trustee is assigned to many open bankruptcy cases. The trustee in the ordinary course of performance of her duties would have direct personal contact with persons or parties in the bankruptcy case, including debtors, who are represented by counsel in the matter. The trustee is authorized by the Bankruptcy Code to retain counsel with approval of the bankruptcy court, including her firm, but does not retain counsel in the majority of cases. The trustee usually retains counsel to represent the trustee's interest in a dispute, with court approval, under 11 U.S.C. § 327 and Bankruptcy Rule 2014.

In many cases, the trustee must communicate with the debtor on a regular basis - to obtain information, for scheduling purposes, to determine claims, recover and liquidate assets, and on a host of other matters within the trustee's responsibility or discretion. Similarly, the trustee regularly communicates with creditors and other interested parties. In some cases, disputes arise between the trustee, on behalf of the bankruptcy estate, and another party, usually the debtor or creditors. These disputes may give rise to litigation in the bankruptcy case called contested matters or adversary proceedings.

The trustee ordinarily has no personal interest in a bankruptcy case, and serves as a fiduciary to the interests of the debtor, creditors, and other interested parties.

QUESTION PRESENTED

May a member of the State Bar of Arizona, who is a bankruptcy trustee, directly contact a person or party in the bankruptcy case who is represented by counsel?

RELEVANT ETHICAL RULES

ER 4.2. Communication with Person Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

ER 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Op. 96-02

Ariz. Op. 00-06

Ariz. Op. 02-02

OPINION

Lawyer serving in a different role.

A lawyer is subject to ethical rules in a number of contexts beyond situations where the lawyer represents a client. E.g., ERs 8.4 (misconduct) and 3.3 (candor toward the tribunal). The question presented here is narrower - what is the restriction on a lawyer-trustee in bankruptcy with respect to ex parte communications with parties represented by counsel?

In Ariz. Op. 2000-06, the Ethics Committee explained that a lawyer appointed solely as guardian ad litem for a juvenile where the juvenile has separate counsel is not in an attorney-client relationship with the juvenile. Therefore, the lawyer was not bound by ER 1.6's ethical duties of confidentiality. The Ethics Committee explained in Ariz. Op. 2000-06 that some of the ethical rules may bind an attorney acting in a particular function while other ERs might not apply:

Attorneys routinely function in roles that draw upon their experience in and knowledge of the law, even though they do not act directly as a lawyer. It is undisputed that attorneys are still bound by the Rules of Professional Conduct regardless of whether their primary function includes an attorney-client relationship or whether other attorneys are involved. See Ariz. Op. 96-01 (attorney-mediator). The application of a particular ethical rule to an attorney acting in another role depends upon the language of the rule and the conduct involved. See, e.g., Ariz. Op. 93-09 (Rule 1.7 does not apply to attorney-legislator).

Ariz. Op. 2000-06 at 3. The plain language of ER 4.2 prevents a lawyer representing a client from contact with a person or entity represented by counsel absent the other lawyer's consent or legal authorization. The rule prohibits both direct contact as well as indirect contact, such as sending a communication to opposing counsel with a copy to the lawyer's client. Ariz. Op. 02-02.

In a different context, Ariz. Op. 96-02 explained the purpose of the rule:

The purpose of the prohibition on ex parte contacts with a party known to be represented by counsel is to "(1) prevent unprincipled attorneys from exploiting the disparity in legal skills between attorneys and lay people, (2) preserve the integrity of the attorney-client relationship, (3) help to prevent the inadvertent disclosure of privileged information, and (4) facilitate settlement." *Lang v. Superior Court*, 170 Ariz. 602, 604, 826 P.2d 1228, 1230 (App. 1992), citing *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990).

Ariz. Op. 96-02 at 2. The question presented presumes the other lawyer does not consent, or that the trustee is concerned about the burden imposed by requesting and awaiting consent. The issue, therefore, is whether the trustee's legal responsibility authorizes contact with a represented party without that party's counsel's consent, or whether there is another exception.

Whether the trustee is representing a client.

Ethical Rule 4.2 applies only when a lawyer is "representing a client." A bankruptcy trustee, in contrast to a party in litigation or a transaction, does not have an interest in the bankruptcy case or disputes that arise in the case, except perhaps matters concerning the trustee's compensation. On the contrary, a trustee serves as a fiduciary for the competing interests in the bankruptcy case. See *Holywell Court v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 1026 (1992). Thus, the trustee is not representing a client in the course of performing his or her duties in a bankruptcy case.

Ethical Rule 4.2 does not prohibit one client from contacting another directly. The official comment to ER 4.2 acknowledges that "parties to a matter may communicate directly with each other . . ." Accord Restatement of the Law Governing Lawyers § 99, cmt. k (2000).

As such, where the lawyer is acting as the trustee, the lawyer-trustee, as a party, may directly contact other parties in the bankruptcy case without their counsel's consent. See *Ariz. Op. 2000-06* (attorney guardian may directly contact minor who is represented by counsel).

This is not to say that a lawyer may have ex parte contacts if he or she is a party to a dispute. In two cases, Arizona lawyers were disciplined for such communications. In *re Sproull*, 2002 *Ariz. Lexis*. 45 (Supreme Court No. SB-02-0004-D 2002); In *re Hohn*, 171 *Ariz.* 539, 832 P.2d 192 (1992). But see Restatement (Third) of the Law Governing Lawyers § 99(1)(b), cmt. e (2000) (arguing that the rule against contact with a represented non-client does not apply where "the lawyer is a party and represents no other client in the matter").

Some communications may be authorized by law.

As indicated, a lawyer may be appointed as counsel to the trustee, including the trustee's law firm. In that case, the lawyer for the trustee is representing a client. Even so, the lawyer may be authorized by law to have certain limited ex parte communications. In the course of performing the duties of the trustee under Bankruptcy Code § 7004, and giving notices under Bankruptcy Rule 2002, for example, counsel for the trustee may be required to send notice to parties identified on a master mailing list even where they are represented by counsel. To the extent such communication is authorized by law, it is outside the prohibition of ER 4.2 and *Ariz. Op. 02-02*, which prevent a lawyer from sending a represented client a copy of a communication to the client's lawyer. See, e.g., *ABA Formal Op. 95-396* (determining that "authorized by law" includes a constitutional provision, statute, or court rule, having the force and effect of law). So too, would a court order.

CONCLUSION

The lawyer-trustee may communicate directly with persons who are represented by counsel concerning the subject matter of the bankruptcy case. This direct communication is limited to

situations where an attorney is appointed to act exclusively as a bankruptcy trustee. If the attorney has a dual appointment to act also as attorney for the trustee, then ER 4.2 applies and prohibits ex parte contacts and communications, unless otherwise authorized by law.

Utah State Bar Ethics Advisory Opinion Committee: Opinion No. 97-07

(Approved May 30, 1997)

Issue: Is a lawyer, acting as a trustee under the United States Bankruptcy Code, required to maintain bankruptcy estate trust funds in a financial institution that complies with check-overdraft reporting requirements described in Rule 1.15?

Opinion: No. A lawyer, acting as a trustee under the United States Bankruptcy Code, is not required to maintain funds in a financial institution that complies with the check-overdraft reporting requirements of Rule 1.15, because the administration of such bankruptcy funds is not the practice of law.

Facts: Pursuant to 11 U.S.C. § 1302, the United States Trustee appointed a lawyer as a Chapter 13 trustee for the District of Utah.¹As a Chapter 13 trustee, the lawyer is a fiduciary for Chapter 13 estates created upon filing a petition for relief under Chapter 13 of the Bankruptcy Code. On behalf of the Chapter 13 estate, the trustee receives money from Chapter 13 debtors. The trustee is bonded, submits regular reports and is audited on a regular basis by the United States Trustee.

Analysis: Utah Rule of Professional Conduct 1.15 now requires a lawyer to enter an agreement with any financial institution where that lawyer has client or third-party trust funds. Under the agreement, the financial institution will report any non-sufficient checks or check overdrafts to the Office of Attorney Discipline.²

However, most of the Rules of Professional Conduct govern a lawyer's actions only in the providing of legal services or in the practice of law. For example, an attorney's direct-mail advertising of mediation and arbitration services is not prohibited under Rule 7.3 since mediation and arbitration services are not the practice of law.³This is true of Rule 1.15. Rule 1.15 states that the rule applies only to property "in connection with a representation." The Comment to Rule 1.15 also suggests that Rule 1.15 only applies in the practice of law.⁴

The administration of a Chapter 13 trust is not the practice of law. The Bankruptcy Code does not require that a bankruptcy trustee be a lawyer.⁵The bankruptcy trustee has no attorney-client relationship with either the debtor or with any of the creditors. The bankruptcy trustee does not act as an advocate for or represent any of the parties. Therefore, a lawyer practicing as a Chapter 13 trustee is not required to conform with the requirements of Rule 1.15 in maintaining Chapter 13 funds.

Provisions other than Rule 1.15 exist to protect Chapter 13 funds. As a bankruptcy trustee, the lawyer must be bonded.⁶The United States Trustee regularly audits the lawyer, and the lawyer submits periodic reports to the United States Trustee. Finally, a lawyer acting as a trustee, even a Chapter 13 trustee, is still subject to Rule 8.4 for any misconduct in the handling of trust funds.⁷

This opinion that Rule 1.15 does not govern the Chapter 13 trustee's actions applies only to the supervision of bankruptcy trust funds. If the lawyer, acting as a bankruptcy trustee, also maintains a non-bankruptcy estate trust fund for a client or a third party, that fund may be subject to Rule 1.15.

Footnotes

1. Although this opinion involves a Chapter 13 trustee, the analysis and result would be the same for other bankruptcy trustees.

2. A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. The account may only be maintained in a financial institution which agrees to report to the Office of Disciplinary Counsel in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Utah Rules of Professional Conduct 1.15(a) (as amended, effective Nov. 1, 1996).

3. Utah Ethics Adv. Op. 97-03, 1997 WL 223849 (Utah St. Bar).

4. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transactions.

Utah Rules of Professional Conduct 1.15, cmt. ¶ 4.

5. 11 U.S.C. § 321 (1994); *In re Construction Supply Corp.*, 221 F. Supp. 124 (E.D. Va. 1963).

6. 11 U.S.C. § 322 (1994).

7. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Utah Rules of Professional Conduct 8.4, cmt. ¶ 3.

Applicability of these Principles to Minnesota

DETROIT CONSUMER BANKRUPTCY CONFERENCE

The Minnesota Code of Professional Conduct appears to be substantially identical to that extant in Arizona. Unless there is a substantial differentiation between the interpretation in Arizona from that to be expected in Minnesota, one would expect the same opinion and result in Minnesota. Judge Steven Rhodes of Michigan has also prepared an interesting article which I would like to call to your attention. The citation to this is *The Fiduciary and Institutional Obligations of a Chapter 7 Trustee*, 80 Am. Bankr. L.J. 147 (2006).

US Attorneys > USAM > Title 9 > Criminal Resource Manual 848
 prev | next | Criminal Resource Manual

848 False Declarations—18 U.S.C. § 152(3)

The False Oath provisions of § 152(2) and the False Declarations provisions of 18 U.S.C. § 152(3) are closely related. Subsection (3) is derived from Subsection (2), the "false oath" offense. In 1976, Congress amended Section 152 to add Subsection 3. This amendment was made in connection with the creation of 28 U.S.C. § 1746, which authorized the use of unsworn statements subscribed to under penalty of perjury but not under oath. Congress added Subsection 3 to Section 152 with the intention of making no changes to the elements of a violation of Subsection 2 of Section 152. Thus, the elements of a violation of Subsection 3 are the same as those that apply to a Subsection 2 violation. The only difference, of course, is that a violation under Subsection 3 does not require the false declaration or statement to have been made under oath.

The policy behind the false oath/false declaration portions of Section 152 is that the debtor has a duty to produce honest, complete financial records.

Bankruptcy law presupposes that one who seeks its protection will deal honestly and fairly with creditors by furnishing a complete and accurate schedule of assets... A debtor has a paramount duty to consider all questions posed on statement or schedules carefully and see that question is answered completely in all respects.

In re Braymer, 126 B.R. 499, 503 (Bankr. N.D.Tex 1991).

Subsection (3) provides:

A person who...knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;...shall be fined..., imprisoned..., or both.

The elements of a false declaration violation have been defined as:

1. the existence of a bankruptcy proceeding;
2. the defendant made a false declaration, certificate, verification, or other statement in relation to the bankruptcy proceeding;
3. the statement must be material; and
4. the statement was known to be false.

Devitt, Blackmar & O'Malley, 2 *Federal Jury Practice and Instructions*, § 24.07 (4th ed. 1990).

Since many documents--e.g., the bankruptcy petition, schedules of assets and liabilities, and statement of affairs--in a bankruptcy case are submitted under penalty of perjury as permitted under Section 1746, the potential scope of this statute is very broad. Even leaving a question blank can constitute a false statement and thus violate 18 U.S.C. § 152(3). *United States v. Ellis*, 50 F.3d 419 (7th Cir.), *cert. denied*, 116 S. Ct. 143 (1995).

PRACTICE TIP: If the statement or testimony is not under oath or under the penalty of perjury consideration should be given to using the false statement provisions of 18 U.S.C. § 1001. See 9-42.000 *et seq.* for a more in depth discussion of 18 U.S.C § 1001.

PRACTICE TIP: The deliberate omission of assets by the debtor on the bankruptcy petition and schedules will violate this section as well as constitute a concealment of the assets. It is often advisable to charge both the concealment of the asset and the false statement even though the same asset is involved.

[cited in USAM 9-41.001]

18 USC §152

A person who—

X (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

X (7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,


shall be fined under this title, imprisoned not more than 5 years, or both.

**18 USC § 1519 - DESTRUCTION, ALTERATION, OR
FALSIFICATION OF RECORDS IN FEDERAL
INVESTIGATIONS AND BANKRUPTCY**

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

11 USC § 541 - PROPERTY OF THE ESTATE

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

 (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

DETROIT CONSUMER BANKRUPTCY CONFERENCE

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)

(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)

(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B)under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)

(1)Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A)that restricts or conditions transfer of such interest by the debtor; or

(B)that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2)A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d)Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e)In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f)Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

11 USC § 526 - RESTRICTIONS ON DEBT RELIEF AGENCIES

(a) A debt relief agency shall not—

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to—

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

(c)

(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have—

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may—

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

(d) No provision of this section, section 527, or section 528 shall—

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability—

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

11 USC § 707 - DISMISSAL OF A CASE OR CONVERSION TO A CASE UNDER CHAPTER 11 OR 13

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

(b)

(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(2)

(A)

(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

- (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or
- (II) \$10,000.

(ii)

(I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall

DETROIT CONSUMER BANKRUPTCY CONFERENCE

include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 302 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed \$1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts; divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B)

(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide—

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims, or \$6,000, whichever is greater; or

(II) \$10,000.

(C) As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated.

(D) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing—

(i) if the debtor is a disabled veteran (as defined in section 3741(1) of title 38), and the indebtedness occurred primarily during a period during which he or she was—

(I) on active duty (as defined in section 101(d)(1) of title 10); or

(II) performing a homeland defense activity (as defined in section 901(1) of title 32); or

(ii) with respect to the debtor, while the debtor is—

DETROIT CONSUMER BANKRUPTCY CONFERENCE

(I) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty (as defined in section 101(d)(1) of title 10) of not less than 90 days; or

(II) performing, and during the 540-day period beginning immediately after the debtor is no longer performing, a homeland defense activity (as defined in section 901(1) of title 32) performed for a period of not less than 90 days;

if after September 11, 2001, the debtor while a member of a reserve component of the Armed Forces or a member of the National Guard, was called to such active duty or performed such homeland defense activity.

(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider—

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

(4)

(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees, if—

(i) a trustee files a motion for dismissal or conversion under this subsection; and

(ii) the court—

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).


(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

 (D)The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

(5)

(A)Except as provided in subparagraph (B) and subject to paragraph (6), the court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest (other than a trustee or United States trustee (or bankruptcy administrator, if any)) under this subsection if—

(i)the court does not grant the motion; and

(ii)the court finds that—

(I)the position of the party that filed the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or

(II)the attorney (if any) who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(C), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

(B)A small business that has a claim of an aggregate amount less than \$1,000 shall not be subject to subparagraph (A)(i)(I).

(C)For purposes of this paragraph—

(i)the term "small business" means an unincorporated business, partnership, corporation, association, or organization that—

(I)has fewer than 25 full-time employees as determined on the date on which the motion is filed; and

(II)is engaged in commercial or business activity; and

(ii)the number of employees of a wholly owned subsidiary of a corporation includes the employees of—

(I)a parent corporation; and

(II)any other subsidiary corporation of the parent corporation.

(6)Only the judge or United States trustee (or bankruptcy administrator, if any) may file a motion under section 707(b), if the current monthly income of the debtor, or in a joint case, the debtor and the debtor's spouse, as of the date of the order for relief, when multiplied by 12, is equal to or less than—

(A)in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B)in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C)in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

(7)

(A) No judge, United States trustee (or bankruptcy administrator, if any), trustee, or other party in interest may file a motion under paragraph (2) if the current monthly income of the debtor, including a veteran (as that term is defined in section 101 of title 38), and the debtor's spouse combined, as of the date of the order for relief when multiplied by 12, is equal to or less than—

(i) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(ii) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(iii) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4.

(B) In a case that is not a joint case, current monthly income of the debtor's spouse shall not be considered for purposes of subparagraph (A) if—

(i)

(I) the debtor and the debtor's spouse are separated under applicable nonbankruptcy law; or

(II) the debtor and the debtor's spouse are living separate and apart, other than for the purpose of evading subparagraph (A); and

(ii) the debtor files a statement under penalty of perjury—

(I) specifying that the debtor meets the requirement of subclause (I) or (II) of clause (i); and

(II) disclosing the aggregate, or best estimate of the aggregate, amount of any cash or money payments received from the debtor's spouse attributed to the debtor's current monthly income.

(c)

(1) In this subsection—

(A) the term "crime of violence" has the meaning given such term in section 16 of title 18; and

(B) the term "drug trafficking crime" has the meaning given such term in section 924(c)(2) of title 18.

(2) Except as provided in paragraph (3), after notice and a hearing, the court, on a motion by the victim of a crime of violence or a drug trafficking crime, may when it is in the best interest of the victim dismiss a voluntary case filed under this chapter by a debtor who is an individual if such individual was convicted of such crime.

(3) The court may not dismiss a case under paragraph (2) if the debtor establishes by a preponderance of the evidence that the filing of a case under this chapter is necessary to satisfy a claim for a domestic support obligation.

RULE 9011. SIGNING OF PAPERS; REPRESENTATIONS TO THE COURT; SANCTIONS; VERIFICATION AND COPIES OF PAPERS

(a) SIGNATURE. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,— ¹

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation

CIVILITY CONCERNS IN BANKRUPTCY
Presented by Cynthia Bullington

Civility Concerns in Bankruptcy

I. Disciplinary Jurisdiction -- Reciprocal Discipline

- a. State: MCR 9.120(C) Reciprocal Discipline. (1) A certified copy of a final adjudication by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys by any state or territory of the United States or of the District of Columbia, a United States court, or a federal administrative agency, determining that an attorney, whether or not admitted in that jurisdiction, has committed misconduct or has been transferred to disability inactive status, shall establish conclusively the misconduct or the disability for purposes of a proceeding under subchapter 9.100 of these rules and comparable discipline or transfer shall be imposed in the Michigan proceeding unless the respondent was not afforded due process of law in the course of the original proceedings, the imposition of comparable discipline or transfer in Michigan would be clearly inappropriate, or the reason for the original transfer to disability inactive status no longer exists
 - a. A respondent attorney has 21 days from the date of issuance of notice to object. If an objection is filed, a hearing is conducted at which the objector carries the burden of proof to show that it is not appropriate discipline.
- b. Federal: When another jurisdiction enters an order of discipline against an attorney admitted to local federal practice, the same discipline is automatically effective in that court without further action being necessary. LCivR 83.22(g)(1). This includes suspension or disbarment. The procedure for reinstatement is governed by LCivR 83.22(i), and is commenced by the attorney filing an application or affidavit for readmission. The request for reinstatement is then assigned to a panel of three judges. The application for readmission will be granted if the attorney is able to carry the burden of proof or no compelling reasons exist against the grant. LCivR 83.22(i).

To practice federal law before the local bankruptcy court, one must be in good standing with the local district court.¹ Certain acts related to bankruptcy matters

¹ LBR9010-1(a) **Appearance by Attorney.** (1) "Except as otherwise provided by law, appearance before the court on behalf of a person or entity may be made only by an attorney admitted to the bar of, or permitted to practice before, the United States District Court for the Eastern District of Michigan, under E.D. Mich LR 83.20..." See also, LCivR 83.22(c)and(d) regarding disciplinary procedures in local federal district and bankruptcy courts.

LCivR 83.20(i)(1) "**Unauthorized Practice.** A person must be a member in good standing of the bar of this court to practice in this court or to hold himself or herself out as being authorized to practice in this court..."

LCivR 83.20(a)(1) "...A person practicing in this court must know these rules, including the provisions for violating the rules." Attorneys practicing bankruptcy law are also expected to know the rules relating to bankruptcy. LBR 9010-2.

are specifically stated *not* to constitute the practice of bankruptcy law in matters directly involving the local federal court. See LBR 9010-1(a)(1)(A)-(F). These acts relate to standardized document preparation where no legal judgment or profound legal knowledge is necessary to complete the forms. Under LCivR 83.20(i)(1)(E), actively licensed attorneys, in good standing, are granted the authority to engage in certain specific acts. The rules further define “practice in this court” to mean:

in connection with an action or proceeding pending in this court, to appear in, commence, conduct, prosecute, or defend the action or proceeding; appear in open court; sign a paper; participate in a deposition; or otherwise practice in this court or before an officer of this court...LCivR 83.20(a)(1)

II. Applicable Rules

- A. Fair Debt Collection Practices Act (FDCPA) may be applicable to an attorney’s harassing conduct in connection with debt collection. See generally, *First Interstate Bank of Fort Collins v Soucie*, 924 P2d 1200, 1202 (CO Ct App 1996). See *Fox v Citicorp Credit Services, Inc.*, 15 F3d 1507, 1513 (9th Cir.1994)(“Attorneys, like all other persons, are subject to the definition of ‘debt collector’ in [the statute].”)
1. Among other provisions, it prohibits an individual who is attempting to collect on a debt from harassment, oppression, and abuse are all prohibited (e.g., violent, obscene, advertisements, incessant calls and calls without disclosure of identity). 15 USCA 1692d.
 2. False, misleading or deceptive means are prohibited. 15 USCA 1692e.
- B. Rule: 6.5 Professional Conduct
- (a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.
 - (b) A lawyer serving as an adjudicative officer shall, without regard to a person's race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent

DETROIT CONSUMER BANKRUPTCY CONFERENCE

possible, the lawyer shall require staff and others who are subject to the adjudicative officer's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.

- C. MRPC 3.5(d) A lawyer shall not engage in undignified or discourteous conduct toward the tribunal.
- D. MCR 9.104 Grounds for Discipline: The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
 - (1) conduct prejudicial to the proper administration of justice;
 - (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
 - (3) conduct that is contrary to justice, ethics, honesty, or good morals;
 - (4) conduct that violates the standards or rules of professional conduct adopted by the Supreme Court...
- E. The Preamble to the Civility Principles of the US District Court, Eastern District states in pertinent part:

An attorney's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as attorneys, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful and efficient manner...

3. Civility Cases

- a. *Grievance Adm'r v Eston*, ADB Case No. DP 48/85 (1987). In that case, the respondent demanded a client file from predecessor counsel in a threatening and intimidating manner. The respondent was abusive in demanding the records and was in the company of an investigator who stood behind him, pounding his fists together in a threatening manner.
- b. *Grievance Adm'r v Noveck*, 91-153-GA (1992) An attorney was reprimanded for rude and intimidating questioning of a deponent and pushing the opposing attorney during a break in the examination.
- c. A lawyer's rude and harassing conduct toward a court clerk resulted in discipline in *Grievance Adm'r v Miller*, ADB Case No. 93-77-GA (1994). In that case, the respondent, while lunging across the intake counter at a district court, grabbed the

button between the breasts of a female clerk and told her that he was just trying to "cop a feel". The same attorney received discipline for his sexually harassing conduct toward his female employees.

- d. *Grievance Adm'r v Robert H. Golden*, No. 96-269-GA (ADB 2002) (After Remand), announcing suspension as the presumptive sanction both pre and post-*Lopatin*: lawyers can expect that conduct rising to the level of a physical assault while performing their legal duties will generally result in a suspension. This does not mean that a suspension may never be imposed for abusive or inappropriate conduct not involving physical contact. Nor does it mean that a suspension will be warranted whenever an attorney touches another person involved in the legal process. In this matter, the respondent attorney placed an opposing attorney in a headlock while scuffling over the course of a deposition.
- e. *Grievance Adm'r v McKeen*, No. 00-61-GA (ADB 2003). In that case, the lawyers sparred verbally, calling each other "weasel" and other things, and then the respondent touched (or grasped) complainant's tie. The Board affirmed a reprimand.
- f. *Grievance Adm'r v David Raaflaub*, 01-94-GA (2003). One year suspension for an attorney who filed pleadings in a criminal action containing a variety of allegations of improper or illegal conduct by various individuals, including a Jackson County Circuit Court judge, an assistant prosecutor, the Jackson County Court Clerk, and others. The assertions included claims that the assistant prosecutor conducted a racketeering enterprise to extort money for personal financial gain, conspiracy, tampering with evidence, and provided the Jackson County Clerk with illegal drugs and cash. The assistant prosecutor was said to have conspired with an individual known as "Judy" to impersonate the complaining witness in the underlying criminal case, to provide false testimony and "to provide sexual favors for the trial judge, in return for payments of cocaine and cash" and other allegations of conspiracy.
- g. *Grievance Adm'r v Dib*, 02-78-GA (2007)

The attorney was found to have deliberately embarrassed and belittled opposing counsel during 14 depositions and in a filed pleading. Respondent deliberately engaged in a pattern of obstructing depositions by using insulting and demeaning language directed at opposing counsel, generally in the presence of others (including parties, witnesses and court reporters), for the purpose of gaining a tactical advantage or simply to embarrass his opponents. Respondent filed a pleading, for the purpose of intimidating and harassing an opposing counsel, which falsely alleged that opposing counsel was mentally disturbed and posed a present danger to respondent. It was found that respondent's conduct was prejudicial to the administration of justice. Respondent insulted and belittled opposing counsel in calling him a "nitwit"; told the client he "should hire another lawyer"; told opposing counsel to be quiet and "shut up"; criticized in a sarcastic

DETROIT CONSUMER BANKRUPTCY CONFERENCE

and demeaning way opposing counsel's competence or ability to ask questions; Respondent told one female attorney "You just button it ... You want to be spanked?" "You've been real good sitting there ... not saying anything and knowing your place in this deposition. So you just sit there and be quiet and enjoy the ride while we're over here talking business." Reprimand coupled with probation.

- h. *Grievance Administrator v Fieger*, 476 Mich. 231, 255; 719 NW2d 123 (2006).

On August 20, 1999 a panel of the Michigan Court of Appeals issued *Badalamenti v Wm Beaumont Hosp*, 237 Mich App 278; 602 NW2d 854 (1999). Respondent Fieger had represented the plaintiff in a medical malpractice jury trial which resulted in a \$15 million verdict and judgment. The Court of Appeals vacated the trial court's judgment in favor of plaintiff finding that the defendants were denied a fair trial because of the persistently improper and highly prejudicial conduct of plaintiff's lead counsel at trial. The respondent attorney discussed the Court's decision in live radio broadcasts of a show he hosted on August 23, 1999 and on August 25, 1999.

Michigan Supreme Court Decision: The Michigan Supreme Court held that lawyers have an unquestioned right to criticize the acts of courts and judges, even during the pendency of a case; there are limitations only on the form and manner of such criticism, limitations that serve compelling interests within the constitutional and legal systems. Nonetheless, lawyers have a special role – in furtherance of a lawyer's duty to maintain a respectful attitude toward the courts, the law has reposed special stewardship duties on lawyers, on the basis of the venerable notion that lawyers are more than merely advocates who happen to carry out their duties in a courtroom environment, they are also officers of the court, and in this exclusive role have special responsibilities in their relations with other officers of the court.

Attorney's comments made on his regular radio show concerning judges of state's intermediate appellate court were directed "toward" tribunal, within scope of "courtesy" and "civility" rules of professional conduct, and not "toward" attorney's listening audience; comments at issue concerned judges who comprised panel which ruled against attorney's client, with regard to content and value of that judgment, were aired on public broadcast, and attacked judges in their capacity as judges in forum designed to reach both public and judges at issue. Comments made were not constitutionally protected political speech, where neither attorney nor judges at issue were involved in any political campaign, comments did not amount to attempt to participate in any campaign, and neither invitations to sodomize judges at issue with client's finger, plunger, or attorney's own fist, nor attorney's invitations to judges to "kiss [his] ass," could be considered interchange of ideas for bringing about of political and social changes.

Attorney's comments with respect to judges of state's intermediate appellate court were not entitled to First Amendment protection, balanced against state's compelling interest in maintaining public respect for integrity of legal process, where no reasonable construction of remarks at issue could lead to conclusion that comments went to professional performance of judges at issue; attorney referred to judges in his regular radio program as "jackass," "Hitler," "Goebbels," and "[Eva] Braun," and suggested that he was "declar[ing] war" on them and that judges should "[k]iss [his] ass," and should be anally molested by finger, fist, or plunger.

CONSUMER BANKRUPTCY –
CONFLICTS and OTHER ISSUES
Presented by Craig Schoenherr

CONSUMER BANKRUPTCY – CONFLICTS

- Conflicts of interest rules are examined more rigorously in the bankruptcy context, most often with respect to professionals retained in business bankruptcy proceedings.
 - 11 USC 327: An attorney employed by a trustee “must not hold or represent an interest adverse to the estate,” and further, must be “disinterested.”
 - A disinterested person is defined as a person who “does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders.”
 - The Bankruptcy Code requirements of disinterestedness and absence of adverse interest are intended to avoid divided loyalties and to ensure the fulfillment of fiduciary duties.
- Actual Conflicts
 - Courts often examine the extent to which a relationship between an attorney and another party rises to a level that a court would consider it adverse to the interest of the estate.
 - Adverse interest test – Courts inquire whether an attorney (1) has any economic interest that would lessen the value of the bankruptcy estate or create a dispute in which the estate is a rival, or (2) possesses a predisposition that would bias the attorney against the estate.
 - Courts have generally held that current representation of a creditor by an attorney applying to represent the debtor is not by itself sufficient grounds for disqualification; however, disqualification on other grounds is still possible.
 - The rule for a trustee or debtor in possession to employ counsel for a special purpose is governed by § 327(e), which allows, with the court’s approval, employment of an attorney who has represented the debtor for a specific purpose, other than conducting the bankruptcy case.
- Potential conflicts, however, are entirely different from actual conflicts.
 - While some courts have held that even a potential conflict will disqualify an attorney from a bankruptcy representation, other courts have applied a more liberal standard.
 - Ultimately, there is little guidance provided beyond demonstrating the fact-intensive nature of a conflicts analysis in every circumstance.
 - Bankruptcy courts often take into account the totality of the circumstances involving each potential conflict.
 - *In re Ray*, 314 BR 643 (Bankr MD Tenn 2004) – Court observed that counsel for a chapter 7 debtor, unlike chapter 11 debtor’s counsel, need not be “disinterested.” § 327(c), the court observed, tolerates some kinds of conflicts, providing that counsel is not disqualified solely by reason of representation of a creditor unless on objection the court finds there is an actual conflict of interest. Here, the court held, even this section was not truly applicable because counsel for the debtors did not represent and had not contractual relationship with the redemption lender.
- Disclosure
 - Conflict disclosure obligations in bankruptcy courts are governed by Bankruptcy Rule 2014, which requires attorneys seeking to be employed by the debtor to

submit an application stating “to the best of the applicant’s knowledge, all of the person’s connections with the debtor’s creditors” and “any other party in interest.”

- Rule 2014 applicants are not expected to disclose “every past or remote connection with every party in interest;” however, they are expected to disclose all connections “presently or recently existing, whether they are of business or professional nature, which could reasonably have an effect on the attorney’s judgment in the case.”
- Curative Measures
 - In some situations, a court will allow a firm holding an interest adverse to the bankruptcy estate to take curative measures in order to represent the debtor.
- Waiver/Consent
 - There is no guarantee that client waivers and consents will be enforceable in bankruptcy cases.
 - One court has stated that “certain conflicts that a client could waive after full disclosure outside of the bankruptcy context, such as simultaneous representation of the client and the client’s creditor, are prohibited by the Bankruptcy Code itself from being waived.” *In re American Energy Trading Inc*, 291 BR 154 (Bankr WD Mo 2003).

CONSUMER BANKRUPTCY – FILE RETENTION

- *E*Trade Securities LLC v Deutsche Bank AG*, 230 FRD 582 (D Minn 2005) – Even in bankruptcy, courts will determine whether a document retention policy is reasonable pursuant to FRCP 37
 - Court must consider (1) whether retention policy is reasonable considering facts and circumstances surrounding those documents, (2) whether lawsuits or complaints have been filed frequently concerning type of records at issue, and (3) whether document retention policy was instituted in bad faith.

CONSUMER BANKRUPTCY – IOLTA

- *White Family Companies, Inc v Dayton Title Agency, Inc*, 468 BR 258 (SD Ohio 2012) - Under Ohio law, sums that had been deposited in debtor/real estate title agency's interest on lawyers trust account (IOLTA) to complete loan closings, even sums that represented provisional credit by bank at which account was maintained in connection with forged check written by customer on nonexistent bank account, were held in express trust, and did not constitute funds in which debtor had interest, as required for avoidance on fraudulent transfer theory under strong-arm statute of payments from account that resulted in negative balance of more than \$4 million when forged check was dishonored.
- *Washington Legal Foundation v Texas Equal Access to Justice Foundation*, 86 F Supp 2d 624 (WD Tex 2000), *rev'd and remanded*, 270 F3d 180 (5th Cir 2001), *cert granted, judgment vacated sub nom*, 538 US 942 (2003) – In light of attorney's continued representation of client after client's bankruptcy filing, retainer paid to attorney remained property of client held in trust by attorney, for purposes of establishing client's standing to challenge constitutionality of Texas Interest on Lawyers' Trust Account (IOLTA) program, despite attorney's failure to apply the retainer to an outstanding bill; nature of the ownership of retainer could not be re-characterized by client's bankruptcy.

ETHICAL ISSUES IN CONSUMER BANKRUPTCY

1) CONFLICTS OF INTEREST

- a) A lawyer is not permitted to represent a client if representation of the client conflicts with the lawyer's own interests, the interests of other clients, or the lawyer's responsibilities to third parties, unless the affected client's consent after disclosure and unless the lawyer is able, despite the conflict of interest, to provide adequate representation
- b) A full and meaningful discussion is required between the lawyer and client about the risks of representation when a conflict of interest is present, as well as any reasonably available alternatives to the representation of multiple parties despite a conflict of interest
 - i) The model rules require each client's informed consent, confirmed in writing, whenever a conflict exists

2) ATTORNEY-CLIENT PRIVILEGE

a) **Generally**

- i) Privilege applies to a communication made between a lawyer and the client in confidence for the purpose of obtaining or providing legal advice
 - (1) This includes legal assistants, secretaries, and other professionals hired by the lawyer to assist in representation (e.g. accountants)
 - (2) Information imparted to the attorney for purposes other than obtaining or providing legal advice is not covered by the privilege

ii) **Waiver**

- (1) Client may waive the privilege
 - (a) If a bankruptcy trustee has been appointed for the corporation, the trustee is entitled to waive the privilege with respect to pre-bankruptcy communications
- (2) Privilege may also be waived through voluntary disclosure of the protected communication in a non-privileged communication

iii) **Exceptions**

- (1) **Crime fraud exception**
 - (a) Arises where the desired legal advice relates not to prior wrongdoing but to future wrongdoing
- (2) There is also an exception for otherwise privileged communications between a trustee of an express trust and a lawyer retained to advise the trustee regarding the trust's administration in an action brought by a beneficiary charging breach of fiduciary duties by the trustee

b) **In Bankruptcy Litigation**

i) **Federal law applies**

- (1) Because Rule 2004 FRBP examinations take place pursuant to federal law, courts have ruled that privilege issues arising in such proceedings are governed by federal common law
- (2) *In re Bazemore*, 216 BR 1020 (Bankr SD Ga 1998) – Chapter 7 debtor's attorney had also been engaged by the debtor's insurance carrier to represent the debtor in prepetition litigation arising out of an automobile accident; a judgment in excess of policy limits precipitated the debtor's bankruptcy filing; the chapter 7 trustee desired to investigate the debtor's potential claim for malpractice or wrongful failure to settle the tort litigation and sought to examine the attorney under Rule 2004

- (a) The court ruled that federal law governed because the investigation about possible claims of the estate was a matter of federal bankruptcy law
- ii) Privilege not applicable to communications of information for purpose of disclosure
 - (1) *United States v White*, 950 F2d 426 (7th Cir 1991) – Court held that the privilege was not applicable to drafts of bankruptcy papers and interview notes of the debtor’s attorney in absence of specification as to what information the client expected to be confidential
 - (a) Thus, communications between the debtor and the lawyer about retention and compensation, which must be disclosed pursuant to 11 USC 329(a), are not subject to the attorney-client privilege
- iii) Bankruptcy trustee’s right to waive the privilege of corporate debtor
 - (1) *Commodity Futures Trading Comm’n v Weintraub*, 471 US 343 (1985) – Court held that, for a solvent corporation, the power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors, and that when corporate control passes to new management, the authority to assert and waive the corporation’s privilege passes as well
 - (a) After analyzing the trustee’s powers and duties in a bankruptcy case, the Court concluded that vesting in the trustee control of the corporation’s attorney-client privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code
 - (b) Thus, the Court held that the trustee had the authority to waive the privilege; this holding, however, does not apply to individual debtors in bankruptcy
 - (2) If the attorney represents both the corporation and the principals, the co-client privilege protects privileged communications between the lawyer and the principals during the course of the representation of both of them
 - (a) Co-client privilege is waivable by either of the clients; the corporation’s trustee could thus waive it
 - (b) Co-client privilege does not apply with regard to an adverse proceeding between the two clients, unless they have agreed that it does
 - (3) Furthermore, because of conflict of interest principles applicable to joint representation of an insolvent corporation and its principals, and attorney usually may not represent both an insolvent corporate entity and its principals; in such a situation, there is no co-client privilege because the attorney represents only the corporation
- iv) Trustee’s right to waive privilege of individual debtor
 - (1) *In re Williams*, 152 BR 123 (Bankr ND Tex 1992) – A liquidating trustee under individual debtor’s confirmed chapter 11 plan could waive the privilege with regard to avoidance actions to be prosecuted by the trustee under the plan
 - (2) *In re Fairbanks*, 135 BR 717 (Bankr DNH 1991) – Trustee could waive privilege of a chapter 7 debtor, a lawyer, in an involuntary chapter 7 case; court held that unique facts justified the waiver (debtor left firm records with his lawyers and disappeared)
 - (3) *In re Hunt*, 153 BR 445 (Bankr ND Tex 1992) – Liquidating trustee under a confirmed chapter 11 plan had not power to waive the attorney-client privilege of

the individual debtors with regard to avoidance actions transferred to the trustee for prosecution

- (4) Most often with a chapter 7 debtor, there is a balancing test that governs the interests of the trustee for the information and the debtor in maintaining the privilege
- (5) With regards to post-petition communications between an attorney and an individual who is a debtor in possession in a chapter 11 case, the court in *In re Eddy*, 304 BR 591 (Bankr D Mass 2004), held that a subsequent chapter 7 trustee could waive the privilege with respect to communications incident to the performance of the duties of the debtor in possession; the court in this case permitted the trustee to waive the privilege with regard to communications that had taken place when the debtor had served as debtor in possession that concerned a pre-petition malpractice claim listed on the debtor's schedules and with regard to post-petition transfers of assets

3) REPRESENTATION OF SPOUSAL JOINT DEBTORS AFTER DIVORCE

- a) In a joint bankruptcy case, the attorney represents both parties; that attorney cannot ethically pick and choose sides or plan strategy favoring one client against the other
- b) A bankruptcy attorney is only able to stay on as attorney in the bankruptcy case so long as the two spouses act in agreement on all decisions; should either spouse disagree on the way the case is to be handled, the attorney will typically be forced to withdraw
- c) Because there are so many options in a bankruptcy case, some attorneys will automatically withdraw to avoid such a natural conflict of interest
 - i) If the attorney moves forward representing both spouses in a joint bankruptcy after divorce, both clients should knowingly waive any potential conflicts of interest in writing

4) REPRESENTATION OF CORPORATION AND OTHER ENTITIES

a) **Generally**

- i) A lawyer is an agent of the entity and not of the entity's representatives who engaged the lawyer or with whom the lawyer consults
- ii) Thus, the lawyer works for the entity, not its officers, directors or agents
- iii) A lawyer may represent such persons who are directors, officers or shareholders in their individual capacity with consent given by a corporate official other than the individual to be represented

b) **Issues in Representation of Insolvent Corporations**

i) **Fiduciary Duty to Creditors**

- (1) Once a corporation becomes insolvent, obligations to creditors cannot, by definition, be met because insolvency means that liabilities exceed assets
- (2) Because these creditors must be paid in full, the law creates a fiduciary duty to the creditors, who are at risk but have no control over management

ii) **Conflicts of Interest Involving Corporate Clients**

- (1) In a chapter 11 case, the debtor in possession has the rights and obligations of a trustee; as such, the debtor's employment of counsel is governed by 11 USC 237(a), which requires the court to approve appointment
 - (a) To be qualified for such employment, the attorney must not hold or represent an adverse interest to the estate and must be "disinterested"

- (b) A disinterested person must not be a creditor, equity security holder, or insider of the debtor, and must not be, and must not for the prior two years have been, a director, officer or employee of the debtor
- (2) The representation of the corporate entity requires advice as to its interests and those of its beneficiaries, now the creditors
 - (a) Therefore, there is a significant risk that the lawyer's duties to the principal will "materially and adversely" affect the representation of the new corporation
 - (b) Consequently, the Model Rules preclude the representation unless both clients consent
- (3) A lawyer representing both a corporation and its principals may face potential liability even if the corporation is solvent, but the risks are magnified when the corporation is insolvent
 - (a) A new lawyer retained to provide representation in an insolvency situation can avoid these problems by representing only the corporation or the principal
 - (b) A lawyer who has represented both the corporation and the principal in previous transactions has a complicated problem in representing either on a going forward basis; if the lawyer continues to represent one client, the other is now a former client
 - (i) Continued representation of a corporate client poses the risk that representation of the corporate entity with fiduciary duties to creditors that displace those owed to the shareholders may conflict with the previous representation of, and loyalty to, the shareholder
 - (ii) Continued representation of the principal, on the other hand, does not seem to carry this risk; the principal, as an individual, has no fiduciary duties as such and loyalty to the corporation would not seem to be something that would interfere with representation of the individual
- (4) Under these principles, it would seem that each insolvent entity must have its own counsel