AMERICAN BANKRUPTCY INSTITUTE

2021 Midwestern Bankruptcy Institute

Consumer Track

Ethics: Duty to Perform

Sponsored by Goosmann Law Firm

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CONCURRENT SESSION

2021

ABI Midwestern Bankruptcy Institute
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Ethics: Duty to Perform

ABA Model Rules of Professional Conduct

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal 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.

Rule 1.3: Diligence

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

Rule 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Federal Rules of Bankruptcy Procedure

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) 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.

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Title 11

§707. Dismissal of a case or conversion to a case under chapter 11 or 13

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(b) . . . (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.

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§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.

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(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.

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§527. Disclosures

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide—

(1) the written notice required under section 342(b)(1); and

(2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that—

(A) all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;

(B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

(C) current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry; and

(D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

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§528. Requirements for debt relief agencies

(a) A debt relief agency shall—

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously—

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

(2) provide the assisted person with a copy of the fully executed and completed contract[.]

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§329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive[.]

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Case Law

Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229, 235-36 (2010).
Attorneys for debtors in consumer bankruptcy cases are debt relief agencies.

In re Clink, 770 F.3d 719 (8th Cir. 2014).
Bankruptcy court sanctioning of debtor's attorney for advising client to lie affirmed. Debtor had been advised to omit disclosure of her horses and payments she had made to her mother. Attorney also filed schedules that differed from the draft schedules signed by debtor. Attorney's attempt to avoid sanctions by arguing that the UST failed to preserve a copy of the §341 meeting tape and thereby prejudiced his rights was unsuccessful. Attorney was also referred for discipline.

Dignity Health v. Seare (In re Seare), 493 B.R. 158 (Bankr. D. Nev. 2013), *aff'd*, 515 B.R. 599 (B.A.P. 9th Cir. 2014).
Attorney failed to do a reasonable investigation into whether a particular debt was dischargeable, resulting in debtor not being properly advised of the risks of filing bankruptcy. Case contains a thorough discussion of professional responsibility issues.

In re Kayne, 453 B.R. 372 (B.A.P. 9th Cir. 2011).
Attorney sanctioned over $20,000 for filing schedules he knew were false and that omitted a promissory note owed to debtor. Debtor later testified that note payments were being made at time of bankruptcy

filing, note had balance of $60,000, and she had informed attorney about the note before filing. Sanctions upheld on appeal.

In re Withrow, 391 B.R. 217 (Bankr. D. Mass. 2008), *aff'd*, 405 B.R. 505 (B.A.P. 1st Cir. 2009).
Attorney sanctioned for failure to undertake reasonable investigation. Case contains detailed discussion of duties under Rule 9011 and §707(b)(4).

In re Finn, 2020 WL 6065755 (Bankr. C.D. Ill. Aug. 28, 2020) (Gorman, J.).
Attorney failed to meet in person with client here and with clients in consolidated case (*In re Custer*). He communicated only by email and brief phone conversations before cases were filed. Schedules and statements of financial affairs in both cases contained numerous errors. Attorney voluntarily returned fees in both cases and was admonished that his conduct fell well short of requirements. Argument that attorney could not be sanctioned under §707(b)(4) because he had not received the safe harbor notice required by Rule 9011 from the UST was rejected. Identical sanctions are available under §§105 and 526 and require no safe harbor notice. *See Law Solutions of Chicago LLC v. Corbett*, 2019 WL 1125568, at *9 (N.D. Ala. Mar. 12, 2019), *aff'd*, 2020 WL 4915335 (11th Cir. Aug. 21, 2020) (involving same firm as in *Finn*).

In re Tatro, 2020 WL 534715 (Bankr. C.D. Ill. Jan. 31, 2020) (Gorman, J.).
Debtor's attorney failed to file motion to avoid obvious non-purchase money security interest in household goods while case was open and then charged debtor fees and reopening court costs to avoid lien later. UST asked for attorney's fees to be reviewed. Attorney argued that he had no duty to investigate lien even though Illinois has a free, user-friendly database where the existence of such liens can be located within minutes. Debtor's attorney ordered to disgorge fees and reopening costs. Court found that attorney's obligations reasonably included searching such free databases even when debtor may not have recalled granting the lien. Debtors' attorneys are required to thoroughly interview the clients, to require the clients to produce relevant information, to review the clients' financial documents and other information provided, and to resolve any inconsistencies or questions before filing the case.

In re Pigg, 2015 WL 7424886 (Bankr. W.D. Mo. Nov. 20, 2015) (Norton, J.).
Attorney sanctioned and referred for discipline when he certified schedules as accurate in two cases even though he knew all assets and avoidable transfers had not been disclosed. Case contains thorough discussion of relevant statutes and rules of professional conduct.

In re Thomas, 612 B.R. 46 (Bankr. E.D. Pa. 2020) (Frank, J.).
Attorney filed a second bankruptcy case for a debtor approximately six months after a prior case was dismissed. In the second case, the attorney filed virtually identical schedules as those filed in the first case without updating the information or taking into consideration information that came to light in first case. Attorney sanctioned.

In re Prophet, 628 B.R. 788 (Bankr. D.S.C. 2021) (Duncan, J.).
Bifurcated fee agreements disallowed as violating attorney's duties under local rules. Attorney's "file now, pay later" program did not allow for the required pre-filing investigation. Case includes discussion of relevant statutes and rules.

In re Brown, 2021 WL 2460973 (Bankr. S.D. Fla. June 16, 2021) (Isicoff, J.).
Attorneys using bifurcated fee agreements are not relieved of duty to meet with clients and review sufficient information prepetition to competently advise clients whether to file and under what chapter to file.

Unfinished Litigation – A Series of Related Cases to Watch

Homa v. Gargula, 2019 WL 6701684 (S.D. Ill. Dec. 9, 2019).
After bankruptcy judge identified over 30 cases in which attorneys associated with UpRight Law appeared to have overcharged or otherwise failed in their duties to clients, judge asked UST to investigate. Attorneys' response to investigation was to file motion to withdraw the reference. The district court denied the request.

In re Potter, 2020 WL 6928782 (Bankr. S.D. Ill. Oct. 30, 2020) (Grandy, J.).
After failing to get the reference withdrawn, the attorneys filed motions to compel closure of each of the more than 30 cases being reviewed by the UST. The motions were denied.

Upright Law v. Gargula, 2021 WL 1516059 (S.D. Ill. Apr. 16, 2021).*
Heading back to the district court, the attorneys appealed the bankruptcy court's denial of the motion to compel closure of each case. The district court found the bankruptcy court's orders were not final and appealable and denied relief to appellants.

Deighan Law v. Gargula, 2021 WL 1516057 (S.D. Ill. Apr. 16, 2021).*
Apparently, as long as they were back in the district court anyway and probably because they drew a different district court judge for the appeal, the attorneys (using an alternate firm name) filed new motions to withdraw the reference in each case. Those motions were also denied.

**Both cases are now on appeal to the Seventh Circuit—consolidated case #21-1876. The Seventh Circuit, on its own motion, raised the issue of whether the district court orders are final and appealable. That issue has been fully briefed, and a decision is expected soon.*

Best Practices: Knowledge and a Plan

1) **Know the Rules**

    a. Prior to engaging in client representation, an attorney should be knowledgeable of the applicable law and rules that govern the practice area and the attorney's professional duties and responsibilities. This includes, but is not limited to, requirements of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, local rules and standing orders, and applicable state rules of professional conduct.

    b. Particularly in light of the rapid changes related to the COVID-19 pandemic, it is essential for attorneys to remain up-to-date on applicable laws, rules, and procedures in order to provide competent representation of clients.

2) **Internal Procedures**

    a. To ensure consistent compliance with the laws and rules, an attorney should develop, implement, and follow internal processes and procedures. An attorney should also take appropriate action to ensure that the internal processes and procedures are also adhered to by staff members.

b. Internal procedures that were once sufficient, may no longer be sufficient as the law evolves and practice changes. There has been an increased reliance on technology as a result of the COVID-19 pandemic and a shift from in-person to telephonic and virtual practice. A firm's procedures for in-person practice may not be sufficient to meet legal and ethical requirements when practice is conducted remotely. It is important for practitioners to consistently review their internal processes and procedures to ensure compliance, develop and implement new procedures as needed, and provide regular training to and oversight of staff members.

3) Telephonic and Virtual Consultations

a. Counsel must make diligent efforts to obtain all information relevant to the representation of a client. Telephonic and virtual consultations should be conducted in a thorough manner to enable an attorney to accurately access a client's financial circumstances, to identify potential issues that may arise in the representation, and to assist the client in developing an appropriate course of action.

b. Information gathering and collection of documentation in a telephonic or virtual consultation may require a greater reliance upon technology than that required in an in-person consultation. Therefore, it is important for an attorney to be familiar with the technology that is to be utilized and to have processes and procedures for virtual consultations that ensure compliance with the requirements of diligence and other legal and ethical obligations.

Best Practices: The Initial Consultation

1) Prior to the consultation, an attorney should provide the consult with a list of documents needed. This will allow time for the consult to gather information prior to the consultation.

2) Provide the consult with assistance in collecting documentation, if needed. Many of the required documents can be obtained by the consult electronically and provided to the attorney electronically. Some information may be in the public record and easily obtained by an attorney or staff member online, such as a real estate assessment or other tax assessment information.

3) Thoroughly review the documents provided. Reviewing relevant documents is essential to accurately access the consult's circumstances and provide the best possible advice.

4) Always verify the identity of the consult. The consult should submit a copy of a valid picture ID and proof of social security number.

5) Ask the consult questions to collect the information needed to accurately complete the petition and schedules. Ensure that the information provided by the consult is consistent with the documentation provided. Take reasonable action to investigate any discrepancies and to ensure the accuracy of the information contained in the petition and schedules.

6) Actively listen to the consult to understand his concerns, objectives, and what he seeks to accomplish through a bankruptcy filing. For example, a consult may indicate that he desires to

file a chapter 7 to "wipe out" all of his debts, but active listening may reveal that his true objectives are to save his home and car in which the payments to both are in default.

7) Seek to identify potential issues that may arise in the representation, such as instances of non-dischargeable debts, property loss, and other issues that could impact a consult's decision.

8) Discuss options with the consult. Fully explain to the consult the potential risks, benefits, and obligations associated with a bankruptcy filing. Thoroughly review the differences, similarities, pros and cons of the various chapter choices. Ultimately, the consult must be given sufficient information to make an informed decision about his options.

9) An attorney should always strive to communicate with the consult in a manner that the consult is able to understand. It is important for an attorney to be able to explain concepts that are sometimes complex (liquidation requirements, above-median debtor, means test, feasibility, etc.) in simple terms that a lay person is able to comprehend and fully understand. In order for the consult to make an informed decision, the attorney must ensure that the consult understands the options.

10) Provide the consult with the disclosures required pursuant to 527(a)(2) and 528(a) in writing. These disclosures can be given to the consult at the time of an in-person appointment or in a written communication (such as a follow up email) after an initial remote consultation. Also, provide the consult with a list of documents, if any, that are needed to move forward with filing in the event that the consult decides to do so.

Best Practices: Appointment at the Time of Filing

1) Ensure that the client has access to a draft of all documentation that is prepared to be filed with the Court. If the appointment is conducted virtually, ensure that a draft of all documentation is sent to the client prior to or at the time of the appointment and that the client is able to view the documentation at the time of the review.

2) Review with the client all documentation that is prepared to be filed with the Court. Ensure that the information is accurate and that the client fully understands the documentation that is prepared to be filed with the Court.

3) Ensure that the client understands that the documents are filed under the penalty of perjury and exactly what that means.

4) An attorney should take reasonable action to verify the accuracy of the information provided, which may include, but is not limited to:

    a. Reviewing relevant documentation provided by the client, such as ID, proof of social security number, tax returns, real estate tax assessment, proof of income, business profit and loss statements, and mortgage statements;

    b. Thoroughly reviewing the petition and schedules with the client. Asking questions in a manner that the client understands. Asking follow up questions when appropriate. Investigating inconsistencies in information provided by the client or in documentation provided by the client.

5) Provide adequate time and opportunity for the client to ask questions concerning the documentation that is prepared to be filed with the Court.

6) Fully explain the client's obligations as a debtor in bankruptcy. Ensure that the client understands the next steps, such as a first payment due date and the requirement of attendance at the Section 341 Meeting of Creditors.

7) At in-person appointments, obtain the client's signature on all required documentation. In virtual appointments, where permitted by the rules, obtain written authorization from the client to affix his or her electronic signature on the documentation and written authorization to file the documentation with the Court.

Materials compiled by:
Veronica Brown-Moseley
Hon. Mary P. Gorman

Faculty

Veronica D. Brown-Moseley is a shareholder at the Boleman Law Firm, P.C. in Richmond, Va., and represents consumers in chapter 7 and chapter 13 bankruptcy cases in the firms' Richmond, Hampton and Virginia Beach offices. She serves as the president of the Hill-Tucker Bar Association, one of the oldest historically African-American bar associations in Virginia. Ms. Brown-Moseley is a past co-chair of the International Women's Insolvency and Restructuring Confederation's Virginia chapter. She also is a co-founder and serves as vice president of Brighter Tomorrows Begin Today, a nonprofit organization dedicated to assisting individuals in achieving their academic and professional goals. Ms. Brown-Moseley is a frequent writer and speaker on consumer bankruptcy-related issues. She received her B.A. in political science from Virginia Commonwealth University and her J.D. from the University of Richmond T.C. Williams School of Law.

Hon. Mary P. Gorman is a U.S. Bankruptcy Judge for the Central District of Illinois in Springfield, appointed in September 2005 by the Seventh Circuit Court of Appeals. She served as Chief Judge from January 2013 until August 2019. Prior to her appointment to the bench, she was in private practice, concentrating in bankruptcy and commercial transactions and litigation. Judge Gorman is a past president of the Winnebago County Bar Association and has been active on the Illinois State Bar Association's Task Force on the Unauthorized Practice of Law and the Commercial, Banking, and Bankruptcy Section Council. She is a member of the National Conference of Bankruptcy Judges, ABI, and the Illinois State, Winnebago County, and Sangamon County Bar Associations. From 1999-2003, Judge Gorman was an adjunct professor of bankruptcy law at the Northern Illinois University College of Law. She has served on the Administrative Office of the U.S. Courts' Bankruptcy Judges Advisory Group and on the Administrative Office's Budget and Finance Advisory Council. She currently serves as one of the five bankruptcy judge representatives on the Judicial Conference Committee on the Administration of the Bankruptcy System and previously served as a liaison to the Judicial Conference Advisory Committee on Bankruptcy Rules and the Judicial Conference Budget Committee's Economic Subcommittee. She also is a member of the task force created by the Bankruptcy Committee to review current policies, rules, and regulations regarding unclaimed funds. Judge Gorman graduated with honors from Rosary College (now Dominican University) and attended the University of Fribourg, Switzerland. She graduated with high honors from the University of Illinois College of Law, where she served as a member of its law review and the Order of the Coif.

Jerry L. Jensen is the Assistant U.S. Trustee for the District of Nebraska, Region 13 in Omaha. He has been with the U.S. Trustee Program since 1989. Mr. Jensen was appointed as Assistant U.S. Trustee in the Omaha, Neb., office in 2019 and was a trial attorney in the Omaha office prior to that. He also served as the Acting Assistant U.S. Trustee in Little Rock, Ark., in 2020. Before joining the U.S. Trustee Program, Mr. Jensen clerked for Hon. William Edmonds in the U.S. Bankruptcy Court for the Northern District of Iowa. He received his J.D. in 1987 from Creighton University School of Law and his LL.M in 1988 from the University of Arkansas School of Law.