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Written Advocacy "Best Practices" (a nonexclusive list)

- **Audience.**
    - Remember your audience: the judge and her law clerk (not opposing counsel). All practice tips for written and oral advocacy flow from this point.
    - Judges are busy and often have thousands of cases on their dockets. Briefs should be concise and easy to read, without sacrificing relevant content.
    - Remember that the "heavy-lifting" is often done by the judge's law clerk, who may be fresh out of law school.
- **Organization.**
    - Begin by examining local and national rules on brief formatting issues like page limits, margin sizes, and font type.
    - Keep motions succinct. They should generally include: (i) relevant facts, (ii) relevant authority, (iii) a request for relief, (iv) an application of facts to law, and (v) a final prayer for relief.
    - Use descriptive headings throughout the brief, even in the background section. Headings keep the judge from getting lost or bored. They also highlight information you believe is important. Consider including a heading every 2-3 pages (especially in the background section).
    - Use proper citation formats, and proofread the brief for typographical and grammatical errors. Professional-looking work conveys that your analysis is reliable.
    - Before the "application" section of the brief, provide a short outline of the argument. The judge can use it as an informal table of contents.
- **Content.**
    - Assume the judge is ignorant of the facts of your case. The brief should include all facts relevant to the relief sought in the motion.
    - Try to limit, however, the amount of "background" information that is not directly relevant. Avoid rehashing the entire history of the case. The judge will be irritated if she is forced to read pages of prefatory background information, only to find that it was irrelevant to the rest of the motion.
    - Do not ignore the "bad facts"—if you don't raise them, opposing counsel will.
    - Provide a complete legal discussion supported by authority. If there is an analytical framework, lay it out.
    - Cite and discuss authority from the applicable circuit, if possible.

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- In a response brief, address every argument in the motion, even the ones you consider "obviously" wrong. To rule in your favor, the judge must deal with those arguments, so you should too. Imagine the response brief as an outline for the judge's opinion. Response briefs should not be in "admit/deny" format—this is reserved for answers.

- In a reply brief, only address arguments raised in the response. Close with a summary reminder of why the relief should be granted.

- **Tone.**

  - Avoid impugning the motives of opposing counsel.

  - Maintain a professional tone.

  - Write in plain English, not stuffy legalese.

  - Keep sentences and paragraphs short, and the language simple and direct.

Oral Advocacy "Best Practices" (a nonexclusive list)

- **Preparation.**
  - Know the record and the law.
  - Prepare demonstrative aids if appropriate. If you are using PowerPoint, be sure to test the equipment in the courtroom before the hearing.
  - Know your argument cold, and avoid memorizing or reading from a script.
- **Presentation.**
  - Dress in a professional manner.
  - At the hearing, after both attorneys appear and greet the judge, the movant should speak first and present the motion (assuming the judge has no initial questions).
  - Welcome questions from the judge. Judges often use hearings to test their understanding of the law as applied to the facts of your case. The hearing is thus an opportunity to address issues that the judge has with your position. Your argument should be flexible and tailored to the judge's questions.
  - Understand what you need to prove or argue to win your case, and be sure to get that information on the record.
  - Assume the judge has read the briefs (unless you know otherwise), and learn how the judge likes to hear arguments (*e.g.*, whether the argument should regurgitate the brief, emphasize strong points, respond to the arguments in the most recent filing, or just answer questions).
  - Organize your argument according to the natural chronology of the subject matter.
  - Avoid overstating the law or the facts, and do not be afraid to concede the obvious.
  - Avoid arguing a point once the judge has indicated that she agrees with you.
  - If the hearing is a trial, learn and abide by the applicable pre-trial order, as well as the judge's standing orders for evidentiary hearings. Always stay focused on the applicable burden and your attempt to meet it or prevent opponents from meeting it.
  - At trial, make life easy for the judge and her clerk. Remain cognizant of organizational issues, and remember that, as difficult as it is for you to understand all the facets of the case, it is even more difficult for the judge and her clerk, who are less familiar with the facts or issues and have thousands of other cases.
- **Demeanor.**
  - At the hearing, be professional and courteous.
  - Do not interrupt opposing counsel or the judge.

- Always speak to the judge when appearing in court—not opposing counsel—and avoid bickering with the other lawyer.
- Maintain a calm demeanor, even if opposing counsel says things you disagree with, and avoid reacting visibly to what opposing counsel says (such as grimacing, frowning, or shaking your head). The judge will give you a chance to respond.
- Do not personally attack opposing counsel in court, and avoid impugning his client's motives (unless motive is directly relevant to the subject matter of the hearing, such as a contempt hearing).

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Business Bankruptcy Practice, Sophisticated Clients and Rules of Professional Conduct

Written by:
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Editor's Note: *See item regarding ABI's new task force on ethics standards on page 89.*

State-based ethics rules provide a framework within which the legal profession has developed. These rules address fundamental issues such as lawyer admission, licensing, practice and discipline, as well as provide guidance with respect to practical practice matters such as hiring decisions, law firm mergers, fee arrangements, advertising, solicitation of clients, client trust funds, client confidentiality and conflicts of interest. In addition to explicitly outlining the core values of the profession, which include loyalty, diligence, honesty and competency, state ethics codes stipulate specific rules for compliance with these values.


Prof. Lois R. Lupica

These specific rules presume a practice model and context that may not be familiar to many business bankruptcy lawyers. The rules largely presume the existence of a two-party dispute, close attorney-client contact and the static notion of identifiable clients with clear and fixed positions. Moreover, state ethics rules take for granted a market of unlimited legal talent, even within certain specialized areas of practice and in limited geographic areas.

Many lawyers whose practices bear little resemblance to their governing rules paradigm find themselves stressing the principles underlying the rules regulating the legal profession—protection of the public, preservation of core professional values, self-regulation and maintenance of professional independence—to the breaking point as they endeavor to comply with the strictures of the rules themselves. When the goals of a body of rules are not achieved by observance of the rules themselves, it may be time to revisit the question of how best to regulate encourage and incentivize the ethical practice of law.[2]

About the Author

Lois Lupica is Special Counsel in the New York office of Thompson & Knight LLP and the Maine Law Foundation Professor of Law at the University of Maine School of Law. She served as an ABI Resident Scholar in 2007.

Rules of Professional Bankruptcy Practice?

The practice of business bankruptcy is extraordinarily complex, with the potential for one case to involve multiple transactions, negotiations and adversarial proceedings. With its objective of reorganizing or liquidating faltering or failing businesses, the practice of bankruptcy may involve the representation of more than one party that owes compound duties to multiple entities and institutions. Parties' interests are aligned and realigned as a matter of course, and side-switching is commonplace. It is a complex hodgepodge of a process, often involving multiple side deals, settlements, dispute-resolution processes and proceedings.

Attorneys who represent parties to a bankruptcy case are governed by both the applicable state ethics rules and the standards set forth in § 327 of the Bankruptcy Code. Section 327 requires that bankruptcy professionals hired by the trustee, including attorneys, be "disinterested" and "hold no interest adverse to the estate."[3] On their face, state-based conflict-of-interest rules and § 327 address the same issues: divided loyalties and the concern of compromised interests. Because conflict-of-interest issues arise in a context that is distinguished by the presence of complex, interwoven and overlapping relationships, § 327 provides for conflict-of-interest *plus* rules, designed to ensure the appearance of propriety as well as the actual integrity of the bankruptcy system.[4]

Because of the one-size-fits-all approach taken by the state ethics rules, coupled with the unique features present in many business bankruptcy cases, the inconsistent interpretation and application of the test set forth in the Bankruptcy Rules[5] and the dynamic and often-changing nature of bankruptcy cases, lawyers are commonly left without meaningful guidance with respect to a number of recurrent issues.[6] These include the (1) identification and reconciliation of conflict-of-interest as a case moves through the bankruptcy process; (2) metaphysical matter of client "identity" when the attorney represents a debtor and the

1 The views expressed herein are those of the author and do not necessarily reflect the views of any institution with which she is associated.

2 There has been much written about the need for specialized ethics rules in many areas of practice other than bankruptcy. *See, e.g.,* Fred C. Zacharias, "Reconceptualizing Ethical Roles," 65 *Geo. Wash. L. Rev.* 169, 190 (1997). For a comprehensive and detailed discussion of the need for bankruptcy-only ethics regime, *see* Nancy Rapoport, "Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics," 6 *Am. Bankr. Inst. L. Rev.* 45 (1998).

3 11 U.S.C. § 327, 101(14) (2005). *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994). (ensuring that "all professionals appointed pursuant to Section 327(a) tender undivided loyalty and provide untainted advice and assistance in furtherance of their responsibilities.").

4 *See In re Nguyen*, BAP No. NC-10-1124 *en banc*, Bk. No 09-10549 (Feb. 7, 2011).

5 Bankruptcy courts have not always consistently applied these rules. Some courts have strictly followed the *per se* disqualification requirement, and others have adopted a more flexible interpretation. *Id.* at 58 (noting inconsistent application of disinterestedness standard).

6 As has been observed, "acceptable ethical behavior outside the realm of bankruptcy often doesn't work inside the realm of bankruptcy." Rapoport, *supra*, n. 1, at 47.

continued on page 65

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Business Bankruptcy Practice, Clients and Rules of Professional Conduct

from cover

estate;[7] (3) matter of conflicting loyalties when an attorney represents a debtor in possession that owes a fiduciary duty to its creditors;[8] (4) potentially conflicting interests when representing a debtor parent and its related entities; and (5) issue of waiver and consent to conflicts of interest.[9] As has been observed, when a lawyer finds himself or herself on a path where decisions are being made, not in the best interest of the process and its objectives, but defensively in order to be in strict compliance with the ethics rules, that is "a path to madness... It is not a responsible way to run a bankruptcy. It just costs too much money. You're going to be spending too much money on lawyer's fees and not enough money on maximizing the value of the estate."[10]

One example that can be viewed either as a judicial circumvention of the state ethics rules, or a clever adaptation, is the development of the concept of "conflicts counsel."[11] In recognizing the practical reality that disqualification of counsel imposes costs on a bankruptcy estate, and thus adversely affects creditor recovery, bankruptcy courts have developed a remedy designed to address the concerns that underlie certain conflicts of interest. Without much discussion of the rationale, judges have sanctioned the hiring of a "substitute firm"—known as "conflicts counsel"—for the narrow purpose of representing a client with an interest adverse to another of the lawyer's clients with respect to a discrete issue, thus avoiding a strictly construed conflict of interest.[12] This "adaptation" is neither explicitly provided for nor sanctioned by state ethics rules, but courts have increasingly approved these arrangements.[13] Referred to as a "trendy technique" necessary to the administration of complex business bankruptcy cases,[14] approval of conflicts counsel is a classic example of court recognition that the costs of strict compliance with an ethics rule may not outweigh the benefit of satisfying the rules' and the bankruptcy system's underlying purposes.

Ethics 20/20 Weighs in on One-Size-Fits-All Rules

The practice of law, including business bankruptcy law, is in a state of dynamic change. Technological advances and the globalization of business have altered the way law is practiced and how many law firms are structured. Innovations in communication and information technologies have transformed the way lawyers communicate with clients, the courts and each other. These developments have also made the practice of law in many practice areas increasingly challenging as lawyers try to conform their practices and behaviors to governing legal ethics rules.

In response to these dramatic changes, the American Bar Association created the ABA Commission on Ethics 20/20 in 2009 for the purpose of reviewing governing lawyer ethics rules in the context of "a global legal services marketplace."[15] It noted that attorneys who practice in law firms with multiple offices and national client bases who represent clients in complex transactions will find very few "answers" to ethical questions in the state ethics rules, even while the lawyers are meeting the goals underlying these rules. According to the commission, with respect to a number of professional-responsibility and practice issues, the governing rules may not meet the objective of encouraging professional behaviors. The issues that are the target of the commission's attention include multi-jurisdictional practice, alternative business structures, confidentiality and imputation, admission by motion and the big one: conflicts of interest.[16]

A consortium of law firm general counsels, risk managers and ethics advisers recently submitted a proposal to the commission advocating for a "modification to the rules of practice (i) governing the relationships between law firms and sophisticated commercial clients and (ii) governing the ability of lawyers to engage in practice across jurisdictional lines."[17] The consortium took the position that the state-based rules regulating lawyer behavior are inadequate to serve the "legitimate needs and expectations of large business clients" as well as the "needs of large, multi-jurisdictional law firms that are the key providers of legal services to such major businesses."[18] Focusing on the lack of uniformity in language and enforcement among state regulatory regimes, as well as on the rules' embedded assumption that "unsophisticated" individual consumers of legal services are largely the target of the protection offered by these rules, the consortium argued that the state ethics rules "do not work well when applied to relationships between large commercial enterprises and their outside counsel." Rather than protecting the interests of these enterprise clients, the proponents claim that application of the state ethics rules both increases the cost of legal services as well as restricts the ability of clients to hire the counsel of their choice.

> The rules imposed by the separate states are primarily designed to protect individual consumers of

7 The question in this context is whether the client is the estate, or the debtor in possession. *See* C.R. "Chip" Bowles, Jr. and Nancy B. Rapoport, "Debtor Counsel's Fiduciary Duty: Is There a Duty to Rat in Chapter 11?," 29 *Am. Bankr. Inst. Journal* 16 (2010); Bowles and Rapoport, "Has the DIP's Attorney Become the Ultimate Creditor's Lawyer in Bankruptcy Reorganization Proceedings?" 5 *Am. Bankr. Inst. L. Rev.* 47 (1997).

8 An attorney in this circumstance must consider the interests of the estate as well as each class of creditors and equityholders.

9 Waivers of and consent to conflicts of interest are far more difficult to address in the context of bankruptcy and in many instances may not even apply.

10 Kielstein, et. al., "Symposium: Mega-Bankrutpcies: Representing Creditors and Debtors in Large Bankruptcies: Conflicts of Interest and Other Ethical Issues," 1 *DePaul Bus. & Comm. L. J.* 557 (2003).

11 Nancy B. Rapoport, "The Intractable Problem of Bankruptcy Ethics: Square Peg, Round Hole," 30 *Hofstra L. Rev.* 977 (2002); Rapoport, "The Need for New Bankruptcy Ethics Rules: How Can 'One Size Fits All' Fit Anybody?," 10 *Professional Lawyer* 20 (1998); Rapoport, "Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy," 26 *Conn. L. Rev.* 913 (1994).

12 Ronald D. Rotunda, "Resolving Client Conflicts by Hiring 'Conflicts Counsel,'" 62 *Hastings L. J.* 677 (2011).

13 *See, e.g., Daido Steel Co. v. Official Comm. of Unsecured Creditors*, 178 B.R. 129 (N.D. Ohio 1995) (bankruptcy court approved retention of law firm on debtor's behalf, when firm was also representing, in connection with unrelated matter, purchaser of debtor's assets. Because separate counsel represented asset purchaser in bankruptcy case, court found that law firm did not have "adverse interest" under § 327); *In re Rockaway Bedding Inc.*, 2007 WL 1461319 (Bankr. D. N.J. May 14, 2007) (firm representing debtor agreed in advance to retain separate conflicts counsel to pursue claims against creditor who was also client of firm in event dispute arose between debtor and such creditor).

14 Michael P. Richman, "Mega-Case Conflict Issues: Enron Committee Counsel," *Am. Bankr. Inst. J.* (September 2002).

15 ABA News Release, "ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers," http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730.

16 The commission recently completed draft versions of their first round of recommendations to be submitted to the ABA House of Delegates at the Annual Meeting in August 2012. These recommendations addressed the issues of outsourcing (identifying the factors to be considered when retaining outside lawyers to work on client matters), confidentiality (addressing issues of meta-data and inadvertent disclosure of confidential information) and inbound foreign lawyers (recommending the ABA Model Rule of Registration of In House Counsel to lawyers from foreign jurisdictions, as well as revisions to Model Rule 5.5).

17 "Proposals of Law Firm General Counsel for Future Regulation of Relationships between Law Firms and Sophisticated Clients," www.abajournal.com/news/article/ethics_20_20_pitch_law_firms_that_serve_sophisticated_clients_need_own_regu/.

18 *Id.* The authors of this proposal made it clear that they were only advocating for revisions to the rules of professional conduct as applied to practices involving "sophisticated clients."

> In doing so, we do not intend to undercut the protections built into the current rules in respect of unsophisticated clients or to challenge the overall structure of lawyer regulation in the U.S. as it applies to such clients. Rather, we seek to maximize the ability of sophisticated clients to structure their relationships with their lawyers in ways that best serve their needs and best accommodate the reality of law firms that are required to deliver services across state lines and international borders.

Id.

continued on page 66

Business Bankruptcy Practice, Clients and Rules of Professional Conduct

from page 65

> legal services who may lack the experience or sophistication to protect themselves against unethical or otherwise improper conduct by the lawyers who represent them... While such rules may be perfectly sensible when dealing with such unsophisticated clients, the strictures and presumptions they impose do not work well when applied to relationships between large commercial enterprises and their outside counsel.[19]

The consortium specifically proposed modifications to conflict-of-interest rules and rules addressing lawyer mobility between firms and limitations on attorney liability, as well as a proposal for uniform enforcement of disciplinary rules across jurisdictional lines. It concluded that the purpose of their proposal was to "initiate a discussion about the urgent need to restructure the current rules governing legal practice to accommodate the legitimate needs of major commercial clients and the realities of the large, multi-jurisdictional law firms that serve them."[20]

Business Bankruptcy, Need for Restructuring of Ethics Rules?

The Model Rules of Professional Responsibility underwent a substantial revision in 2000, ostensibly to address recent developments and changes in legal practice. Ironically, it has taken almost a decade for the states to conform their rules to the structure and substance of the Model Rules.[21] In that time, the financial markets, technology, globalization and practice of law have all experienced seismic shifts. Business bankruptcy law has only gotten more complex and sophisticated, as claims trading and alliance shifting have become ever more commonplace. Attorneys practicing business bankruptcy, in their effort to conform their practices and decision-making to ethical norms, are struggling with inconsistencies and ambiguities between state ethics rules, bankruptcy rules and bankruptcy practice, and are spending increasing amounts of time and estate resources reconciling and working around these divergences. Has the time come for business bankruptcy lawyers to initiate a similar discussion? ■

19 *Id.*

20 ABA Commission on Ethics 20/20 Proposals of Large Firm General Counsel For Future Regulation of Relationships Between Law Firms and Sophisticated Clients, March 2011, http://op.bna.com/mopc.nsf/id/jros-8g4efm/$File/General%20Counsel%20proposals.pdf.

21 As of Nov. 3, 2010, 46 states have adopted a version of the Model Rules of Professional Responsibility. Two states have circulated their proposed rules based on the Model Rules, two states have revision committees formed but have not yet issued their report, and one state (California) has not adopted the Model Rules. In the interest of full disclosure, the author was the Reporter for the Maine Ethics 2000 Task Force. After two years of drafting and revision by the task force, the Supreme Judicial Court of Maine adopted the proposed revision recommended by the Task Force, effective Aug. 1, 2009.