AMERICAN BANKRUPTCY INSTITUTE

2017 Southwest Bankruptcy Conference

Consumer Track

Avoiding Malpractice and Other Common Pitfalls in Consumer Cases

J. Ford Elsaesser, Moderator
Elsaesser Jarzabek Anderson Elliott & MacDonald, Chtd.; Sandpoint, Idaho

Stephen E. Berken
Law Offices of Stephen Berken; Denver

James F. Kahn
Kahn & Ahart, PLLC; Phoenix

Hon. Deborah J. Saltzman
U.S. Bankruptcy Court (C.D. Cal.); Los Angeles

CONCURRENT SESSION

2017

Avoiding Malpractice and Other Common Pitfalls in Consumer Cases

American Bankruptcy Institute
25th Annual Southwest Bankruptcy Conference
Friday, September 8, 2017

Presented by:

Ford Elsaesser, Moderator
Elsaesser Jarzabek Anderson, Sandpoint, Idaho

Hon. Deborah Saltzman
U.S. Bankruptcy Court (C.D. Calif.); Los Angeles, CA

Stephen Berken
Stephen Berken Law; Denver, CO

James F. Kahn
Bankruptcy Legal Center™; Phoenix, AZ

Avoiding Malpractice and Other Common Pitfalls in Consumer Cases

Table of Contents

July 28, 2017

The Bankruptcy Practice and Malpractice; the Role of the Expert Witness

Presented by:
Ford Elsaesser
Sandpoint, Idaho

Professional malpractice, perhaps more than any other type of civil action, often comes down to a battle of the experts. Forget about the old adage that experts shall never give their opinion on ultimate issues of law.

Having been a Chapter 7 and Chapter 12 bankruptcy trustee, handling over 40,000 cases, as well as serving as an expert witness in numerous malpractice cases, I have seen "standard of care" issues from both sides.

As a Chapter 7 trustee, I regularly see malpractice by debtors' counsel. Unfortunately for the debtor, the malpractice almost invariably ends up benefiting the bankruptcy estate, and in the vast majority of such cases, to the extent the malpractice claim itself was property of the estate under § 541, it is much easier and faster for the estate to recover and administer the "damages" from such malpractice than to actually pursue a malpractice claim. Recently discharged debtors are rarely in a position to actively pursue a malpractice claim.

As an expert witness, I somewhat regularly opine as to whether the standards of care have been met in a particular fact situation in a pending lawsuit. The expert opinions proffered by counsel for the plaintiff/client and the defendant/lawyer have a huge impact on whether the case settles, is dismissed or goes to trial.

For purposes of our panel discussion, I have enclosed redacted expert reports, opinions and disclosures of expert witnesses in two cases in which I participated as the witness for the primary defendant. These are cases that arose from a consumer and small business case, and the purpose is to give all of the attendees an understanding of what really goes on in a malpractice case, and that much of the battle is fought between the expert reports, as opposed to a court of law. (Both of these cases settled.)

Respectfully submitted,

Ford Elsaesser

[redacted]

Attorneys for Defendants / Counter-Claimants / Third-Party Plaintiffs

IN THE DISTRICT COURT OF THE [redacted]
OF THE STATE OF [redacted] COUNTY OF [redacted]

[redacted]	Case No. [redacted]
Plaintiffs,	
v.	
[redacted]	
Defendants.	
[redacted],	
Counter-Claimants/ Third-Party Plaintiffs,	
v.	
[redacted]	
Counter-Defendants/ Third-Party Defendants.	

EXPERT REPORT OF OPINION WITNESS, FORD ELSAESSER

EXPERT REPORT OF OPINION WITNESS,
FORD ELSAESSER - 1

Background

I am an attorney licensed to practice in the state and federal courts in the State of Idaho (Idaho State Bar #2205). I reside in Priest River, Idaho, and am senior partner of the firm of Elsaesser Jarzabek Anderson Elliott & Macdonald, Chtd. with offices located in Sandpoint and Coeur d'Alene, Idaho.

I have been active in the practice and teaching of bankruptcy law since 1978. A copy of my curriculum vitae and biography are attached to this report.

Specifically, with regard to bankruptcy practice, my experience is as follows:

1) I have been a Chapter 7 bankruptcy trustee for Northern Idaho since 1984, handling approximately 30,000 cases.
2) I have been a Chapter 12 bankruptcy trustee for Northern Idaho since 1986, and have been the sole Chapter 12 bankruptcy trustee for the Eastern District of Washington since 1995.
3) I have served as a Chapter 7 bankruptcy trustee in the United States Bankruptcy Court in the Eastern District of Washington; Nevada; Arizona; and Montana. I have served as a Chapter 11 bankruptcy trustee on numerous occasions in Idaho, Eastern Washington, Nevada and Arizona, and have served a number of times as a state and federal court receiver.
4) I have handled a large number of consumer and business bankruptcies as representative for the debtor and creditors' committees. My Chapter 11 experience includes small business cases, as well as the largest and most successful Chapter 11 in the Pacific Northwest, *In re: Stayton SW Assisted Living, LLC*, Case 09-CV-06082-HO in the U. S. District Court, District of Oregon.

5) For the past 13 years, I have taught in the LL.M. Program at St. John's University School of Law, which grants the only LL.M. in bankruptcy in the country. I have taught other courses in that LL.M. Program, as well, including for several years, the representation of trustees in bankruptcy.

6) Since 2004, I have been the bankruptcy professor at the University of Idaho College of Law in Moscow, Idaho; as well as teaching for one year creditors rights, and teaching for four years federal courts at said College of Law. For ten years, I have taught an Advanced Bankruptcy Course in the spring semester at said College of Law, focusing on Chapter 11, and for over 15 years, I have coached the University of Idaho College of Law's moot court teams in the *Honorable Conrad B. Duberstein Bankruptcy Moot Court Competition.*

7) I have taught in well over 300 Continuing Legal Education and Judicial Education courses related to bankruptcy law, including speaking over 40 times throughout the country for the American Bankruptcy Institute program, *Bankruptcy Issues for State Trial Court Judges.*

8) I am a Fellow in the American College of Bankruptcy, Sixth Class; and have served in many executive positions of the American Bankruptcy Institute, the largest organization of bankruptcy professionals, including as President in 1999 and Chairman in 2001.

9) I practice regularly in Bankruptcy Courts in Idaho, the Eastern District of Washington, and Montana, and am familiar with the customs and practices involved in appearing and practicing before those courts.

10) I have been retained as an expert witness in matters involving bankruptcy law, including cases involving professional liability claims against attorneys, and in one instance, against a Chapter 7 trustee.

11) My hourly rate is $[redacted]

12) In connection with my opinion in this case, I have reviewed numerous pleadings in the [redacted]' Chapter 11 case; all of the pleadings filed in the state court action; all of the answers to written discovery and a substantial portion of the produced documents in the state court action; the expert reports of Messrs. [redacted] and [redacted]; the depositions of [redacted], and numerous related documents. I have also reviewed all of the pleadings with regard to the adversary action of [redacted], related to the *In re:* [redacted] bankruptcy case, [redacted], Adversary case [redacted]. I have also interviewed the defendant, [redacted], and [redacted], attorney for Mr. and Mrs. [redacted] in their bankruptcy, as well as counsel for Mr. and Mrs. [redacted] in the nondischargeability adversary proceeding filed by the [redacted].

Opinion

Based upon my review of these documents, and my knowledge and experience of the practice of bankruptcy law, my opinions are as follows:

The actions of [redacted], as counsel for [redacted] and in particular, as Chapter 11 counsel for [redacted], were entirely appropriate and were the ethical course of action to take, given the nondisclosure in the [redacted] Chapter 11 case.

While there was some mention by Mrs. [redacted] in a [redacted] email in communication with Mr. [redacted] with regard to the [redacted], the [redacted] appear to have never provided Mr. [redacted], as

he was preparing the actual documents which would be filed with the Bankruptcy Court, with any communications or documentation regarding the [redacted], to the extent that they were secured creditors on property of the Chapter 11 bankruptcy estate, in particular on what has been referred to as the "[redacted] property." In particular, neither the debtor Mr. [redacted] nor [redacted], identified any debt that was owed or secured by a second deed of trust on such property, which would be significant in the context of Chapter 11, both in terms of notice to the [redacted] and the decisions that other creditors would need to know in consideration of a Chapter 11 Plan. After the [redacted] email, there were multiple intervening drafts of supporting Schedules, none of which informed Mr. [redacted] that the [redacted] were creditors due to their interest in the [redacted] property. Therefore, there was no disclosure of this obligation in the bankruptcy Schedules and Statement of Financial Affairs, where such debt should have been itemized on Schedule D, nor in the Plan and Disclosure Statement that were filed. The debtor, [redacted] and not his counsel, Mr. [redacted], had a duty to ensure the accuracy of his bankruptcy pleadings. The nondisclosure ultimately resulted in a confirmed Chapter 11 Plan, that among other things, directly impacted the [redacted] since the first mortgage on the [redacted] property was "crammed down" to a value of $[redacted] and based upon the representation of Mr. [redacted] in his Disclosure Statement and Plan, the [redacted] would have been wholly unsecured as to the amount of the [redacted]' claim in the [redacted]' Chapter 11 bankruptcy.

Omitting the [redacted] was a material nondisclosure. [redacted] was rightly concerned about the possibility that the nondisclosure would become apparent to the Bankruptcy Judge and would become a matter of public record in the [redacted] trial, and Mr. [redacted]'s consultation with bar counsel, Mr. [redacted], was entirely appropriate. While Mr. [redacted]'s discovery of the [redacted]' problem pre-dated his consultation with bar counsel and

motion to withdraw, Mr. [redacted] and Mrs. [redacted] never responded to Mr. [redacted]'s urging that this was a disclosure matter, nor did Mr. [redacted] authorize Mr. [redacted] to essentially reopen the Chapter 11 bankruptcy case for the purposes of amending the Schedules and amending the Plan to deal with the obligation to the [redacted]. Assuming that Mr. and Mrs. [redacted] had made some "other arrangement" with the [redacted] to the [redacted]' satisfaction, there would likely be no harm to the [redacted]' Chapter 11 process by taking the proper course of action by providing this disclosure.

A material nondisclosure in a bankruptcy proceeding can subject the debtor to substantial sanction within the bankruptcy process, such as a dismissal or conversion from Chapter 11 to Chapter 7; and could also create the necessity for the Court, the United States Trustee, or bankruptcy professionals representing other parties to make a criminal referral. This is particularly critical since the claims against Mr. [redacted] were assets of the Chapter 11 bankruptcy estate of [redacted].

Although it is awkward to have a withdrawal on the eve or day of trial, the withdrawal of Mr. [redacted] did not seriously prejudice Mr. and Mrs. [redacted] in pursuing the nondischargeability claim. The case had been briefed, and pretrial matters had been submitted. New counsel for Mr. and Mrs. [redacted], or Mr. and Mrs. [redacted] *pro se*, would be capable of putting on the evidence that Mr. [redacted] anticipated putting on in support of the nondischargeability claim. The capability of the [redacted] to pursue the adversary action *pro se* is supported by (1) the various emails between Mr. [redacted] and the [redacted], wherein they discuss procedural issues, including deadlines, the necessary elements of the [redacted]' claims, and the available evidence; (2) the [redacted]' review and knowledge of the evidence in the adversary action; and (3) Mr. [redacted]' admission regarding his and Mrs. [redacted]' knowledge of the evidence. In my experience, the

[redacted]' pursuit of the adversary action *pro se*, rather than with counsel, would not have impacted their ability to a fair trial before Judge [redacted]

It is my opinion that Mr. [redacted]'s actions in moving to withdraw, taken in conjunction of the advice of bar counsel, was appropriate and was done in a manner to protect the interests of Mr. and Mrs. [redacted], particularly in minimizing the risk of substantial civil and possibly even criminal processes that could have occurred if the nondisclosure of the [redacted]' note and second deed of trust had come to light. The possible negative consequences for [redacted], if the nondisclosure had become apparent, were far greater than any benefits of obtaining a nondischargeable judgment in the [redacted] litigation.

[redacted] Consented to Dropping Claims under Sections 523(a)(2) and 523(a)(4), as well as Section 727(a).

It is my opinion that [redacted] were properly advised to limit their claims in the adversary action against the [redacted] to Section 523(a)(6) because there did not appear to be sufficient evidence to sustain the burden of proof that [redacted] would have had to meet under Section 523(a)(2) or 523(a)(4). Similar burdens existed under any pursuit of a denial of discharge under Section 727(a).

There was no material evidence of fraud in the incurring of debt (523(a)(2)); fraud in the performance of acts as a fiduciary (523(a)(4)); or the fraudulent conduct required to deny or revoke discharge under Section 727 of the Bankruptcy Code. To the extent there was any action by Mr. [redacted] that would give rise to a finding of dischargeability, it would be in the nature of willful and malicious conduct on the part of Mr. [redacted]. There was no indication of any acts by Mrs. [redacted] that would trigger liability on her part.

With no indication of fraudulent conduct or actual concealment, or any other actions that can form the basis of a denial of discharge under Section 727(a), the [redacted]' only claim remaining was to seek nondischargeability as to Mr. [redacted] for willful and malicious conduct under Section 523(a)(6). That claim would have been very challenging to prevail on, but was the only claim that would involve either determination of nondischargeability or denial of discharge, if all or a portion of Mr. [redacted]'s actions were found by the Court to be willful and malicious. It is my opinion that Mr. [redacted] did the best job possible in preparing to take on such a case under Section 523(a)(6). On behalf of the [redacted], Mr. [redacted] had done extensive and thorough discovery and preparation, all of which efforts could have been utilized by subsequent counsel or by the [redacted] operating as their own counsel.

Any Damages Suffered by [redacted] by Not Successfully Litigating the [redacted] Matter Were Caused by [redacted]' Refusal to Accept an Extremely Advantageous Settlement

The record of this case is clear that Mr. and Mrs. [redacted], for inexplicable reasons, did not follow Mr. [redacted]'s advice in obtaining a stipulated nondischargeable judgment against Mr. [redacted] for $[redacted]. Declining this settlement made no sense. Mr. and Mrs. [redacted] knew that they likely had no claim against Mrs. [redacted], and that no significant evidence existed that would have ever found her liable under Section 523(a)(6) of the Bankruptcy Code. The claim against Mr. [redacted] while stronger, was still a significant challenge, as noted above. The standard of proof for showing willful and malicious conduct under 523(a)(6), under the applicable case law, is very high, and such proof did not exist against Mrs. [redacted].

Accepting a $[redacted] judgment against Mr. [redacted] was a "win-win" proposition. A nondischargeability judgment, if properly renewed, is "forever." [redacted] would have saved all costs and expenses of further litigation. The refusal of [redacted] to accept this settlement, against

the strong advice of Mr. [redacted], was an error in judgment on their part. [redacted] had a very difficult road to prove a case against Mr. [redacted] and as stated, had a virtually impossible-to-prove claim against Mrs. [redacted].

[redacted]'s Pretrial Filings Were Timely with the Evidence He Had Received.

The [redacted] provided some of the documents to [redacted] that they wished to have used as evidence too late in order to meet the pretrial requirements. Mr. [redacted] was very clear on these deadlines and did everything possible to comply with them.

Mr. [redacted]'s handling of the late exhibits provided by [redacted] did not materially impact the 523 claim as it stood, and Mr. [redacted]'s actions with regard to getting pretrial filings in "on time" were entirely appropriate and met the standard of care reasonable under the circumstances. Mr. [redacted] was attentive to these matters, and the lateness of some of the exhibits were not in any way related to neglect on his part.

DATED this _____ day of [redacted]

[redacted]
Ford Elsaesser

[redacted]

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE [redacted] DISTRICT OF THE STATE [redacted] THE COUNTY OF [redacted]

[redacted] Plaintiffs, v. [redacted] Defendants.	Case No. CV [redacted] DECLARATION OF [redacted]

I, [redacted], pursuant to [redacted], declare as follows:

1. I make this declaration upon my own personal knowledge and am competent to testify to the matters set forth herein.

2. I was admitted to the practice of law in [redacted]. A substantial portion of my practice involves bankruptcy matters, dealing with both creditor and debtor clients.

3. I have been retained by the plaintiffs to render an opinion respecting the legal services and advice rendered by [redacted] to her clients, the plaintiffs [redacted] A

copy of my reports are attached hereto as Exhibit 1 and is incorporated herein as though set forth in full. I have reviewed the documents set forth at page 1 of Exhibit 1 and hold the opinions set forth in Exhibit 1 and in this declaration with a reasonable degree of legal certainty.

4. An elementary point of bankruptcy law is that, upon filing a Chapter 7 bankruptcy proceeding which seeks discharge of the debtors' debts, the bankrupt estate to which creditors can look for payment includes profits from an entity owned by debtors at the time of filing. Specifically excluded from the bankruptcy estate are earnings from services performed by the bankruptcy debtor after the bankruptcy filing. See 11 U.S.C. § 541(a)(6)

5. At the time the plaintiffs retained defendant [redacted] to prosecute their Chapter 7 bankruptcy petition, they owned a corporation, [redacted]. Also, at this time the plaintiffs were participants in a multi-level marketing program wherein plaintiffs recruited persons to engage in direct sales of a company's [redacted] health food products, programs, and supplements. In order to earn a living in this program, the plaintiffs were required to devote a substantial amount of time and effort to training and motivating those persons recruited to sell the product. As testified in their affidavit in connection with a summary judgment motion:

> 20. Developing a new area takes a lot of time, energy, and expertise. Direct sales organizations do not "run" or build themselves. Successful Marketing Executives must continually motivate their marketing teams to sell product and recruit other Marketing Executives. We do this by continually training, developing relationships, and continuing to enroll new Marketing Executives. We travel a significant amount of time in order to sustain our sales level at [redacted]
>
> 21. Attrition refers to the number of Marketing Executives leaving the organization compared to the number of Marketing Executives that continue to sell in the organization. Long-term retention is achieved

> by leaders who continue to enroll new Marketing Executives and take those Marketing Executives through the training cycle. Generally speaking, if the leader does not continue to train, motivate, and recruit over time, the business organization will shrink.
>
> 22. Unless a Marketing Executive provides continual ongoing training and recruiting of new Marketing Executives, his/her business will soon shrink and cease to exist.
>
> 23. Marketing Executives and their recruits are independent distributors of [redacted] and are issued a 1099 to report their annual gross commissions. They are self-employed, independent contractors, and are never employees of [redacted].

Exhibit F to the [redacted] affidavit.

6. From the time the plaintiffs filed their Chapter 7 petition in 2011 through 2013, the plaintiffs deposited their earnings from their [redacted] work into [redacted] Inc., which as noted above constituted an asset of the [redacted]' bankruptcy estate as did the profits of [redacted] Inc., which were the [redacted]' earnings. That is, the post-petition earnings of the [redacted], generated over the period of three years of the bankruptcy litigation, were not clearly excluded from the bankruptcy estate because of their deposit into [redacted], an asset of the estate. Ultimately, the trustee obtained a $[redacted] judgment against the [redacted] which was a portion of their earnings from [redacted].

7. Defendant [redacted] breached her duty to the [redacted] by failing to advise them that by treating their earnings as profits of [redacted] Inc., they were taking a certain, known the risk that their post-petition earnings would be treated by the trustee as part of the bankruptcy estate and would belong to their creditors.

8. In addition to failing to advise the [redacted] of this risk, defendant [redacted] breached

her duty by not advising the [redacted] to (a) either dissolve the [redacted] corporation and take the [redacted] earnings directly, or (b) move for an abandonment of [redacted] pursuant to 11 U.S.C. § 554. If abandonment was denied, the plaintiffs were then free to seek employment elsewhere which earnings would clearly have post-petition status and not become part of the bankruptcy estate.

[redacted] would have received a more favorable result had the money been characterized as wages and then exempt because it shifts the burden to the trustee to prove the property is property of the estate and not exempt, i.e., rather than starting with the assumption that profits are property of the estate.

9. As a proximate result of attorney [redacted]'s negligence, the clients continued for a period of three years to receive their earnings as profits of the corporation which did not enjoy the exclusionary status usually accorded to post-petition earnings. As a further proximate result of defendant [redacted]'s negligence, the bankruptcy court ruled that $[redacted] of the clients' post-petition earnings belonged to their creditors as part of the bankruptcy estate and judgment against them was entered in this amount.

10. During the course of litigation over the status of plaintiffs' earnings as profits from [redacted] Inc., defendant [redacted] agreed to a stipulated set of facts, eschewing her clients' testimony, which stipulation failed to document the tremendous amount of time the [redacted] expended in earning commissions from their work in selling [redacted] products.

The Court noted the insufficiency of the stipulation in his Memorandum decision:

> The stipulated facts and evidence simply do not demonstrate the kind or amount of personal services the [redacted] performed to "earn" the shareholder distributions. . . . Because the parties elected to submit the issues to the Court for decision based upon the limited,

> stipulated record in lieu of trial, they are accountable for the impact of those limitations in proving their case. . . . Here, the record submitted by the [redacted] is inadequate to satisfy their burden of proving that the payments were excluded from the bankruptcy estate.

Exhibit E to [redacted] declaration [redacted]

11. To recap: each of the following acts and omissions by defendant [redacted] was negligent, i.e., fell below the applicable standard of care for [redacted] attorneys, and proximately resulted in a $[redacted] judgment against the plaintiffs:

a. Failure to advise the plaintiffs of the risk that by running their post-petition earnings through [redacted] those earnings may belong to the bankruptcy estate.

b. Failure to advise the clients to dissolve [redacted] Inc., and take commission earnings directly from [redacted].

c. Alternatively, after filing bankruptcy, [redacted] failed to recommend that the [redacted] move to abandon [redacted] on the grounds that after paying business expenses, [redacted] had a de minimus value. If the motion were granted, the earnings would not become part of the estate. If the motion were denied, the [redacted] would have sought work elsewhere which earnings would be post-petition and not become part of the bankruptcy estate.

d. Even without taking either courses of action in paragraph (b) and (c) above, the plaintiffs could have avoided judgment had [redacted] not agreed to a set of stipulated facts which stipulation failed, as noted by Judge [redacted] to

"demonstrate the kind or amount of personal services the [redacted] performed to "earn" the shareholder distributions". The hard work undertaken by the [redacted] but which did not become part of the record, is included in their summary judgment affidavits which motion was never heard.. See above, paragraph [redacted]

I declare under penalty of perjury pursuant to the laws of the State [redacted] the foregoing is true and correct.

DATED this [redacted]

[redacted]

DECLARATION OF [redacted] - 6

[redacted]

This report is made pursuant to the scope of my engagement as an expert for the Plaintiffs in [redacted] I have reviewed the following pleadings that were filed in the adversary proceeding:

- Docket for Bankruptcy Case# [redacted]
- Complaint
- Statement of Asserted Undisputed Facts in Support of Debtors' Motion for Summary Judgment
- Affidavit of [redacted]
- Memorandum in Support of Debtors' Motion for Summary Judgment
- Exhibits filed by [redacted] (current income of Debtor)
- Exhibits filed by [redacted] (examination of [redacted] transcripts)
- Affidavit of Trustee in Response to Motion for Summary Judgment
- Statement of Disputed and Undisputed Facts by Trustee
- Trustee's Memorandum in Response to Motion for Summary Judgment
- Reply Brief
- Affidavit of Debtors in Support of Reply Brief in Support of Motion for Summary Judgment
- Joint Stipulation of Facts
- Memorandum Decision
- Judgment

In addition, I have reviewed selected correspondence between the plaintiffs and defendants from between [redacted].

I have also listen to the audio of the [redacted] hearing regarding the exemption of pre petition wages.

The case at hand raises several issues.

1) The first is the advice provided to the debtors regarding the status of an entity in bankruptcy, and whether or not certain property becomes property of the bankruptcy estate.
2) Could you dissolve the entity?
3) Could you move to abandon the entity after the bankruptcy filing?
4) Should the matter be heard on stipulated facts?

The Bankruptcy Estate

The bankruptcy estate is comprised of all of the Debtors' interest, pursuant to 11 U.S.C. § 541. This is intentionally broad, as discussed by cases in the Ninth Circuit.

Specifically, included under 11 U.S.C. § 541(a)(6) are proceeds, product, offspring, rents, or profits of or from property of the estate. This also specifically except such as are earnings from services performed by an individual debtor after the commencement of the case.

11 U.S.C. § 541(a)(7) also includes any interest in property that the estate acquires after the commencement of the case. In other words, if there is an item of property which is property of the estate, anything that that acquires is also property of the estate. It is also clear from the statute that profits from an entity owned by the debtors are property of the bankruptcy estate.

In this case, if the entities were dissolved prior to the bankruptcy filing, there would not be proceeds, product, offspring, rents, or profits from property of the estate. It would simply be income derived by the debtors from services they perform, and presumptively not be property of the estate.

Could the Entity be Dissolved?

There is no direct evidence on point but both parties indicated the entity could have been dissolved and the parties stipulated that "[redacted] does not require participants to form legal entities to participate in its program" Joint Stipulation of Facts and Exhibits P2). This report is based on the assumption the entity could have been dissolved and the [redacted] money could have been paid directly to the [redacted]

If the entity had been dissolved, or if a different entity had been created subsequent to the bankruptcy filing, the monies received by the debtors would not have been money created by property of the estate, or by profits from property of the estate, due to the fact that the new business would not have been property of the estate.

Could the [redacted] have moved to abandon the property pursuant to 11 USC 554?

An option the [redacted] should have discussed early on is if they should ask that the entity be abandoned from the estate. They would have the burden to prove the property is "burdensome to the estate or that it is of inconsequential value." 11 USC 554(b)

This would have allowed for an early determination if the trustee had an interest in the property, if any of the payments could be received, and if the [redacted] wanted to continue to work for [redacted] under the entity. In other words, if the trustee had prevailed, it would have been early on in the case and any damages would have been minimized.

Should the matter be heard on stipulated facts?

The procedure of this case before the court was based on the Joint Stipulation of Facts and Exhibits stipulated by both the debtors and the trustee. This is a very common way to resolve disputes in the bankruptcy context, given the regular application of uncontested facts to the bankruptcy code. The problem, in this case, as the memorandum decision point out, is the Joint Stipulation of Facts and Exhibits does not set forth evidence that the monies received from downstream marketing executives is derived, in any way, from earnings from services performed by an individual debtor after the commencement of the case.

The trustee will bear the burden of proving that property is property of the bankruptcy estate.

Notably, the affidavit of [redacted], which appears to be Exhibit 10 to the debtors' statement in support of the motion for summary judgment, was not included in the Joint Statement of Disputed Facts. The court also referenced this exclusion in is memorandum. Upon review of that affidavit, it appears Mr. [redacted] asserted much stronger arguments regarding the nature of those earnings, than was set forth in the joint facts.

I would point out that an excerpt of their deposition was included, but that excerpt does not describe what roles and duties they have in selling their own product, versus roles and duties they have in receiving money from downstream marketing executives. This is a vital facts to determine whether or not property is excluded under 11 U.S.C. § 541(a)(6), that simply was not adequately set forth in the Statement of Undisputed Facts.

No evidence was produced by the trustee that this income derived by [redacted] was pursuant to a employment contract, or some other income device. The argument of the trustee was, because this was income derived from property of the bankruptcy estate, there was property of the bankruptcy estate pursuant to 11 U.S.C. § 541, as opposed to it presumptively not being property of the estate, due to the fact that it was not being derived from property., which was undisputed the property of the bankruptcy estate.

Conclusion

5) The first is the advice provided to the debtors regarding the status of an entity in bankruptcy, and whether or not certain property becomes property of the bankruptcy estate.
    a. The debtors absolutely should have been advised about the risk of the trustee owning the entity and the repercussions of that. If given the debtors would have the opportunity to dissolve the corporation or not.
6) Could you dissolve the entity?

a. It appears from the record that there would not be an issue dissolving the entity and assigning the earnings directly to the [redacted] as compensation or commission.

7) If the entity was dissolved and the income assigned to the [redacted] would the trustee have prevailed?
   a. I think it is more likely than not that if the [redacted] monies were paid directly to the [redacted] the money would not become part of the bankruptcy estate, and the trustee conceded as much in his memorandum decision. (Trustee's Memorandum in Response to Summary Judgment, P 8.).

8) Could you move to abandon the entity after the bankruptcy filing?
   a. Yes, the debtors could have and should have moved to abandon the property from the estate by proving that after payment of business expenses, and the Quillings wages the entity would be de minimus in value. Typically this is done early in the process to again determine if there is a dispute as to value and nature of property.
   b.

9) Should the matter be heard on stipulated facts?
   a. Yes, but not these stipulated facts. It is very common to hear contested issues on stipulated facts in the Bankruptcy Court. The issue I see is the complexity of the nature of the earnings and the fact that so little of the most crucial facts were not included in the final joint stipulated facts. The motion for summary judgment may not have been granted to either party due to a disputed fact in the parties affidavits and statement of disputed and undisputed facts.

[redacted]

[redacted]

[redacted]

[redacted]

I have reviewed the Expert Report of Ford Elsaesser filed on or about [redacted] and make the following commentary:

I. Motion to Abandon

Mr. Elsaesser reports that he does not believe that abandonment would have changed the outcome in the case. I strongly disagree with this. The bankruptcy code allows for abandonment of property pursuant to 11 U.S.C. § 554 as follows:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

It is not uncommon for debtors to move to abandon property to put the matter in front of a court to get an early decision. It is also not uncommon for the trustee to not concede that it is, in fact, property of the bankruptcy estate to begin with, but if there is any question of whether the trustee is going to make a demand on the asset, the trustee would have to file an objection in response to the motion to abandon with his position, and then there would be an evidentiary hearing if the trustee objects. This would not be a red flag to the trustee, this would be a red flag to the debtors that, if the trustee was going to make some demand on this property, they would have made the decision at that time early on in the case, whether or not they should have continued to work for [redacted]

Again, I strongly disagree with Mr. Elsaesser's position that "if the trustee successfully had resisted a motion for abandonment, it would not necessarily in any way change the ultimate decision of the court with regard to the characterization of personal income versus the revenue received from [redacted]." The problem with this proposition is, if two months after the bankruptcy was filed, the debtors had filed a motion to abandon and the trustee objected, claiming that the income from [redacted] was property of the estate, the [redacted] would not continue to work in the same capacity.

It does not follow that, if the [redacted] were aware that the trustee was going to make demand on the [redacted] income, that they would have continued to work, essentially, to make

money for the trustee, or as they could have made the decision to simply do a different line of work where they were paid for their personal services only.

II. Expanding the Record on the Stipulated Facts

[redacted]

[redacted]

SUPERIOR COURT OF [redacted]

[redacted]

Plaintiffs,

v.

[redacted]

Defendants.

No. [redacted]

DEFENDANTS' DISCLOSURE OF EXPERT WITNESS ELSAESSER

Mr. Ford Elsaesser
Elsaesser Jarzabek Anderson Elliott & Macdonald, Chtd.
123 South Third Avenue, Suite 24
Sandpoint, ID 83864
(208) 263-8517

A resume detailing Mr. Elsaesser's qualifications is attached.

Mr. Elsaesser is an attorney licensed to practice in Idaho and has appeared in U.S. bankruptcy courts in many jurisdictions, including in the Eastern District of Washington. He has also taught courses in bankruptcy law and procedure and courses in the duties of and serving as a bankruptcy trustee. Mr. Elsaesser may testify and offer the following opinions.

[redacted]

He has reviewed the Complaint in this matter and select key documents and is familiar with the [redacted] bankruptcy proceedings and the work of the Trustee in the [redacted] proceedings.

From a review of the key documents, and based on his general familiarity with the underlying matter, Mr. Elsaesser is of the opinion that [redacted] and its attorneys met the standard of care in defending [redacted] in the underlying litigation. [redacted] did the things that a competent attorney would do in defending a [redacted] being sued on a fraudulent transfer claim in a Ponzi scheme setting. For example, [redacted] challenged personal jurisdiction. In this regard, [redacted] filing of proofs of claim made a personal jurisdiction challenge very difficult. They insisted on formal service of process. They investigated the underlying financial report prepared for [redacted]. They challenged the Trustee's assertion that [redacted] was a Ponzi scheme and was insolvent. They challenged whether the Bankruptcy Act could have extra-territorial effect. They undertook to try to achieve settlements for their clients. In this particular regard, it would certainly be common if not required for the trustee to insist on verified financial statements in order to compromise an adversarial claim. Without clients willing to submit verified detailed financial disclosures, the prospects of achieving a settlement with the trustee were essentially nil. [redacted] also consulted with [redacted] about presenting a good-faith defense at trial. [redacted] regularly communicated with [redacted] about ongoing issues and events. All of these actions were appropriate and the efforts met or exceeded the standard of care for an attorney in a similar circumstance.

Mr. Elsaesser may testify to his familiarity with the work of bankruptcy trustees. This would include the duties and procedures of a trustee in a proceeding like that which involved [redacted] bankruptcy. He may testify to the attributes of a Ponzi scheme, the work done by the financial examiner in the underlying matter and the work of the trustee in the underlying matter.

[redacted]

He may testify that under the law persons who are net positive in a Ponzi scheme face a difficult legal and procedural landscape in an adversarial action. Under the law, persons who are net positive almost always have to return the net positive returns above their pay-in amounts. And, they may lose their pay-in amounts unless they can adequately show good faith. He may also testify that [redacted]' refusal to testify at trial greatly complicated proof of a good-faith defense. Without live testimony in trial, it would be extraordinarily difficult if not impossible to show good faith. [redacted]' instruction that [redacted] should not spend money preparing for trial made the situation even worse. Thus, [redacted] was placed in a difficult factual situation in representing their clients in the underlying matter.

To date, plaintiffs have not disclosed opinions of a qualified expert regarding the specific events or issues that they contend fall below the standard of care. When those are identified, it can be expected that Mr. Elsaesser will supplement his opinions and consider the issues that plaintiff identifies more specifically.

DATED [redacted]

[redacted]

[redacted]

relevant facts which you understand to be within the knowledge of such person.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 1: [redacted] Bar Counsel,[redacted]. To the extent this interrogatory seeks facts within the knowledge of the witness, plaintiffs object as speculative, i.e., requiring the prescience of plaintiffs as to the retentiveness of each person's memory. Also, to the extent this interrogatory seeks witness trial testimony, plaintiffs object as not discoverable by the attorney work product privilege.

INTERROGATORY NO. 2: Have you, your attorneys, or any person, firm or corporation acting on your behalf, consulted with, or engaged any experts in connection with this litigation? If so, please identify each expert, including their names and addresses, and for each, please provide all information referenced in[redacted] and answer the following:

(a) Please state the subject matter on which your expert(s) is expected to testify and state the substance of every fact and opinion to which the expert is expected to testify, and setting forth the underlying facts or date supporting or tending to support those opinions as required by Rule[redacted] Rules of Evidence.

(b) Please state if your expert(s) has ever been disqualified or prevented from testifying by any court; and if so, please state the name of the case, jurisdiction, civil action number, that date that such disqualification occurred, and the identity of the attorneys involved in the action.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 2:

A. Expert:[redacted] attorney at law,[redacted] admitted to bar[redacted], [redacted] U.S. Court of Appeals, Sixth Circuit;[redacted] U.S. District Court,[redacted] [redacted] U.S. District Court,[redacted] U.S. District Court, [redacted], U.S. Court of Appeals[redacted] *Education:* Harvard

University (A.B. cum laude [redacted]); University of Notre Dame (J.D., cum laude [redacted]). Law Clerk of the Honorable [redacted] *Member:* [redacted]

B. Substance of opinion: Defendant [redacted]'s withdrawal as attorney of record for the plaintiffs in [redacted] (U.S. Bankruptcy Court Case [redacted]) fell below the applicable standard of care for [redacted] attorneys. This opinion is held for the following reasons: (1) the withdrawal occurred on the day of trial, and (2) the grounds for withdrawal, i.e., a purported conflict of interest, were not disclosed to the Court, were pretextual, and did not justify Mr. [redacted]'s withdrawal. Mr. [redacted]'s claimed conflict of interest was not a conflict of interest. If it is seen as a conflict of interest, it was benign and waivable by the client which waiver opportunity was not afforded clients.

C. Opinion:

(1) Prejudice to client by withdrawal: The withdrawal of a plaintiffs' attorney on the day of trial will result in a number of outcomes, all prejudicial to the interests of the plaintiff/client: (1) Outcome No. 1: delay of trial and fees incurred for unnecessary trial preparation; (2) Outcome No. 2: delay of trial, fees incurred, and additional expense of bringing new counsel up to speed; (3) Outcome No. 3: delay of trial, fees incurred, additional expense, and sanctions imposed for trial delay, (4) Outcome No. 4: dismissal of case because of financial inability to retain new counsel (5) Outcome No. 5: dismissal of case and fees awarded to prevailing party.

Conceivably, there are circumstances which can justify a trial *continuance:* illness/death of client or attorney; eleventh hour discovery of critical evidence; unavailability of key witness, natural catastrophe, etc. However, apart from illness, the circumstances which justify day-of-trial

withdrawal of plaintiff's counsel are limited to a sudden emergence of a conflict of interest which conflict is not waivable by the client. Attorney [redacted]'s playing the conflict card to avoid a trial in [redacted], on the day-of-trial, was conduct which did not comport with the standard of care for [redacted] attorneys.

Here, the clients' financial inability to retain new counsel resulted in a dismissal of the case.

(2) Non-existence of perceived conflict of interest: The conflict of interest which Mr. [redacted] advised the Court justified his withdrawal on the day of trial was not disclosed to the Court. However, Mr. [redacted] represented to the Court that he had conferred with Bar Counsel, Mr. [redacted], who advised him that a conflict existed.

Mr [redacted] advised his clients that the conflict consisted of the failure to list a creditor, one [redacted], on [redacted] Chapter 11 bankruptcy schedules which Mr. [redacted] had prepared. This claimed conflict of interest did not justify [redacted]'s withdrawal for several reasons:

(a) There was no conflict of interest. Client had inadvertently omitted [redacted] from the schedule and advised [redacted] that [redacted] should be included as a creditor;

(b) Creditor [redacted] had been disclosed to Mr. [redacted] several months before and [redacted], through inadvertence or otherwise, had omitted [redacted] as a creditor from the bankruptcy schedules. Given this fact, Mr. [redacted]'s representation to the tribunal that he first became aware of the "conflict" within the "last 36 to 48 hours" is inexcusable on more than one level (ethically, morally and professionally).

(c) From an ethical and conflict-of-interest standpoint, the issue of [redacted]'s disclosure, or not, as a creditor was irrelevant to Mr. [redacted]'s ability to prosecute the adversarial matter against Mr. [redacted] et al.

For all of the above reasons, the conduct of Mr. [redacted] fell below the applicable standard of care for [redacted] attorneys.

D. Data and information considered (item nos. (3), (4) and (7) attached hereto).

(1) Plaintiffs' Response to First Request for Discovery dated [redacted] in the herein matter;

(2) Adversary Complaint in [redacted] (Case No. [redacted];

(3) Miscellaneous emails between [redacted] and clients circa September [redacted], discussing creditor [redacted] (approximately one year prior to trial);

(4) Emails from [redacted] to clients identifying the [redacted] omission as a conflict of interest ([redacted]; day before trial) and confirmation of the amendment adding creditor [redacted];

(5) Motion to re-open Chapter 11 case filed by [redacted] ([redacted]) on day prior to adversary trial;

(6) Motion for leave to withdraw in adversary matter ([redacted]); and

(7) Trial transcript ([redacted]) on first day of trial in adversary matter.

E. Miscellaneous: No applicable testimony or publications as described in Rule 26(b)(4).

DATED This [redacted]

[redacted]

[redacted]

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE [redacted]

OF THE STATE OF [redacted], IN AND FOR THE COUNTY [redacted]

[redacted]

Plaintiffs,

vs.

[redacted]

Defendants.

Case No. [redacted]

PLAINTIFFS' SECOND SUPPLEMENTAL RESPONSE TO DEFENDANT'S FIRST SET OF DISCOVERY

Second Supplemental Answer to Interrogatory No. 2:

Additional Expert: [redacted]. *See* attached profile. Mr. [redacted]'s hourly rate is [redacted] per hour.

Mr. [redacted] is expected to render the following opinions during the trial of this case.

1. Defendant [redacted]'s withdraw as attorney of record for the Plaintiffs in [redacted] (U.S. Bankruptcy Court Case No. [redacted]) breached the applicable standard of care for attorneys practicing in similar situations. Defendants' actions breached the applicable

standard of care because it occurred the day before trial on the [redacted]'s adversary claims in the referenced case and the stated basis of withdrawal, i.e. that Defendant had a "non-waivable" contact was contrived, as he had not conflict of interest with Plaintiffs. The alleged conflict that Mr. [redacted] claimed would not be considered a conflict by any bankruptcy attorney practitioner, especially in an unrelated matter, unless the Plaintiffs refused to disclose actual, required disclosures in their bankruptcy case. Such was not the case in this instance, as the Plaintiffs repeatedly requested it be disclosed, and were not requesting that Defendants withhold any information. Even if the purported conflict could be construed as a conflict, it would have been waived by the Plaintiffs. Further, Mr. [redacted] will testify consistent with those opinions held by fellow expert witness [redacted], who was previously disclosed, as set forth in Plaintiffs' Supplemental Response to First Request for Discovery, served on or about [redacted].

2. Defendant breached the applicable standard of care by withdrawing Plaintiffs' claims in the referenced Bankruptcy Case brought under 11 USC Section 523(a)(2)(4) and 11 USC Section 727(a)(3) and (4) in his trial brief. Defendant breached the standard of care by withdrawing said claims without the consent of Plaintiffs, and without any explanation to the Court. His later attempt to revive said claims failed, and evidenced that he recognized his breach of that duty.

3. Defendant breached the applicable standard of care by failing to disclose exhibits by the deadline established by the Court to file exhibits. The exhibits that were filed in an untimely manner were necessary for Plaintiffs to prove non-dischargeability during trial. He further failed to properly conduct discovery by the deadline established, even after acquiring an extension for discovery. Failure to properly conduct discovery led to the court denying extra time to conduct discovery, and to disallow submission of relevant information.

Mr. [redacted] reviewed the following documents in formulating his opinions:

1. The Docket of [redacted] and pleadings filed in that case including the Adversary Complaint filed [redacted], the Motion for Leave to Withdraw, filed [redacted], pleadings filed in relation to the Motion to Reopen the Chapter 11 Case, filed [redacted] Pleadings filed in [redacted] Chapter 11 bankruptcy proceeding, [redacted].

2. Selected emails and correspondence between Defendant and Plaintiffs regarding the [redacted] matter and Defendant's withdrawal as Plaintiffs' counsel in [redacted]

3. The Transcript from the hearing held on [redacted] before the Honorable [redacted]

[redacted]
Attorney for Plaintiffs
[redacted]

Avoiding Malpractice and Other Common Pitfalls in Consumer Cases

American Bankruptcy Institute
25th Annual Southwest Bankruptcy Conference
Friday, September 8, 2017

Presented by:

James F. Kahn
Bankruptcy Legal Center™
James F Kahn PC
Phoenix, Arizona

Steve Berken
Berken Cloyes PC
Denver, CO 80204

1. ***Considerations for The Initial Intake***
    a. Does the P/C client have realistic expectations?
        i. Is the debtor trying to save a house? Does he have sufficient income?
        ii. Is the income stable to fund a plan? (The *Real Estate Agent* factor)
        iii. If chapter 13 is in the future, is this someone you want in your life for the next five years?
        iv. Has the P/C been to three other attorneys?
        v. Use your nose. Do you get the sense the client plays it fast and loose with the truth?
        ("Oh, that art gallery in Telluride?")
    b. Pre-bankruptcy planning? What role should we have?

Pigs versus hogs. When is the planning too much? As the Bankruptcy Code does not specifically prohibit conversion of nonexempt assets to exempt assets, an attorney advising a client to do a **modicum** of pre-bankruptcy planning is not ethically wrong. But there are limits.

Based on the legislative history of Code section 522, Congress contemplated the conversion of nonexempt property to exempt property prior to filing for bankruptcy. [2] Both the House and Senate reports state:

As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors and permits the debtor to make full use of the exemptions to which he is entitled under the law. [3]

In those districts where exemptions are minimal, prohibiting pre-bankruptcy planning would be particularly difficult to debtors. Still, many courts will deny claims of exemptions if there is clear evidence of abuse. Where there is the presence of "badges of fraud" during the conversion of assets, courts look askance at conversion of nonexempt to exempt property.

Case law consistently recites the axiom that the mere conversion of nonexempt assets to exempt assets is not to be considered fraudulent, nor grounds for barring a debtor's discharge under § 727(a)(2)(A).1

Further suggestions for pre-bankruptcy filing:

--Financing a car pre-petition and minimizing the impact of above-Means Test debtor. In re Ransom, 562 U.S. 61 (2011).

--Credit card use prior to filing. Best to wait 90 days to avoid § 523(a)(2) problems.

--Non-DSO obligations in the divorce decree. Read the divorce decree. Chapter 13 may be the best route. Divorce decree requires payment.

2. ***"Good Fences Make Good Neighbors" Robert Frost***
   a. The importance of a good WRITTEN fee agreement.
      i. It's mandatory!
         1. For all "Debt Relief Agencies." 11 U.S.C. § 528(a)(1)
         2. Almost all consumer-debtors' lawyers are "Debt Relief Agencies" if we provide services to "assisted persons." 11 U.S.C. § 101(12)
         3. The term "assisted person" means any person whose debts consist primarily of consumer debts; exception: if the value of the debtor's nonexempt property is less than $192,450. 11 U.S.C. § 101(3)
         4. DEADLINE: not later than 5 business days after the first date on which the agency provides any bankruptcy assistance services to an assisted person, but prior to the petition being filed. Id.
      ii. Requirements:
         1. The contract must explain clearly and conspicuously –
            a. The services such agency will provide; and
            b. The fees or charges for such services and the terms payment.
         2. The assisted person shall be provided with a copy of the fully executed and completed contract.

   b. It is equally important to delineate what counsel is <u>not</u> hired to do. Failure to perform any service that the debt relief agency informed and assisted person or prospective assisted person that would provide a connection of

1 *See Marine Midland Bus. Loans, Inc. v. Carey (In re Carey)*, 938 F.2d 1073, 1077 (10th Cir. 1991) (reasoning absent extrinsic evidence of fraudulent intent, mere conversion will not support denial of discharge); *Moreno v. Ashworth (In re Moreno)*, 892 F.2d 417, 419 (5th Cir. 1990) (finding actual intent to defraud creditors condition precedent to denial of discharge); *Norwest Bank Neb., N.A. v. Tveten*, 848 F.2d 871, 874 (8th Cir. 1988) (finding "absent extrinsic evidence of fraud, mere conversion of nonexempt property to exempt property is not fraudulent as to creditors even if the motivation behind the conversion is to place those assets beyond the reach of creditors"); *Ford*, 773 F.2d at 54 (concluding mere conversion of nonexempt assets into exempt assets on the eve of bankruptcy filing will not prove fraud); *First Tex. Sav. Ass'n v. Reed (In re Reed)*, 700 F.2d 986, 991 (5th Cir. 1983) (finding "mere conversion is not to be considered fraudulent unless other evidence proves actual intent to defraud").

the case or proceeding under Title 11 has associated penalties. 11 U.S.C. § 526(1)

c. Using "Milestones" in fee agreements. What is earned and when is it earned. Placing unearned funds in trust.

Sample

How fees are earned:

1. *Time is kept hourly in increments of 6 minutes. Reasonable cost for overhead, difficulty of the case, preclusion of other cases and time limitations were accounted for in the above-disclosed fee. In return for the above-disclosed fee, the attorney agrees to provide the following services outlined below. The attorney will consider earned and capitalize the pre-petition fee amount on the following schedule:*

50%	*Engagement Retainer Fee. Includes opening the case file, initial consultation, retaining appointment, explanation of documents needed, explanation of bankruptcy process, and initial analysis of case under the "Means Test." At this point the firm is available for advice, guidance and will handle all creditor calls and correspondence.*
40%	*Collection and Preparation of Documents and Schedules. Includes paperwork reviews with client, creation of petition, schedules, statements and the "Means Test" for filing with the court, as well as meetings and correspondence with client in relation to the preparation of subject schedules.*
10%	*Filing of the Case. Reviewing documents with client and signing said documents, filing of the petition and all schedules with the court, post-petition representation at the Meeting of Creditors.*

In consideration for the fee, Attorney will provide the following pre-petition and post-petition services:

2. *Attorney will take calls from and correspond with client(s) creditors as appropriate. Client(s) and Attorney agree that this service will continue post-filing and Attorney will notify creditors telephonically for a reasonable period after the filing.*

3. *Attorney will advise and counsel Client(s) regarding chapter 13 Bankruptcy action. If bankruptcy is not a viable option, Attorney will work with client(s) to provide options or alternative solutions for debt relief.*

4. *Attorney will prepare all court papers on Client(s) behalf necessary and expend the necessary efforts to commence Client(s) chapter 13 including:*
   - *i. Meet with client to analyze debt problem;*
   - *ii. Chapter 13 petition;*
   - *iii. Statement of financial affairs and schedules;*
   - *iv. Formulate the Chapter 13 plan.*

d. Highly recommended reading: BAPCPA is now 12 years old. It's time to reread 11 US Code §§342, 526, 527, 528 carefully to be reminded of our duties under the code and the penalties for noncompliance.

3. ***The Mechanics of Representation***
   a. Using a written questionnaire. *Just in case the debtor forgets to tell you about the boat.*
      i. Best Case Offers "My Case," an online questionnaire that clients are required to fill in.
      ii. The questionnaire is then merged into draft schedules and the statement of affairs.
      iii. The process requires careful attention to detail as clients' notions don't always mesh with the bankruptcy code; e.g., secured vs. priority debts. (No, the loan from Aunt Matilda isn't a priority debt.)
      iv. Recharacterizing or moving data is far easier & more efficient than initial input by staff.

   b. Due diligence in preparation of the schedules & statement of affairs
      i. All info is cross-checked against clients' documents which we also require clients to produce. The cross check includes verification of creditors' addresses as required by 11 U.S. Code §342(c)(2). Ineffective notice to a creditor may
         1. Vitiate discharge;
         2. Minimize/eliminate penalties for §362 violations.
      ii. Protect against malpractice and possible Rule 9011 sanctions by preventing the client from making a statement in a document filed that is untrue or misleading which upon the exercise of reasonable care, should have been known by the debt relief agency to be untrue or misleading;
      iii. How much are we allowed to rely on an unknowledgeable client's statements of fact?
         1. Presuming an honest but unaware client?
         2. Considering the apparent or obvious condition of the client's records/record-keeping?
         3. Guarding against the devious or fraudulent client?
      iv. Inconsistent and Conflicting Schedules.
         1. The Ying/Yang effect.
         2. If you enter something here, you need to change something there.

   c. Why the "sign off" is the most important interaction with the client and counsel, using the "Jedi Mind Trick." **Use the sign-off meeting to search for clues about your client, ala' CSI.** Are there medical bills listed? Does that mean there was a car accident? Is there a pending personal-injury claim? Did the accident involved alcohol or drugs?

   d. Calendaring deadlines & follow-up.
      i. Known important dates should be automatically calendared by staff or through a program with default entries.
         1. Amicus Attorney automates the process.

2. Consider using Outlook or various other professional calendaring systems—but use a system! Even if it's internally created.
3. Compliance with Rule 1007(c) and others.
4. Follow-up with the client is a must:
    a. Response to trustees' early document requests;
    b. Sec. 341 reminder, including "bring your I.D."
    c. "Feel Good" notices to client confirming:
        i. No objections to exemptions;
        ii. No complaints;
        iii. Entry of discharge;
        iv. Case closing.
5. "Bragging Rights." Clients will think you are wonderful and ever-so skillful.

e. Document maintenance.
    i. Duty to retain original, signed records per ECF filing rules (In the District of Arizona: the later of one year after case closure or all appeals terminated); Originals may be delivered to the client with notice of the one year requirement.
    ii. Compliance with State Bar rules re preservation and protection of client property.
    iii. Disclosure to client of your policies regarding document retention.

4. Collateral Issues and Malpractice Hot Topics

a. Some folks do not belong in bankruptcy—
    i. Possible fraudulent conveyances,
    ii. Fraud claims being litigated in state court.

b. See chart regarding most common issues.

c. Unbundled Services/Limited Scope Representation.

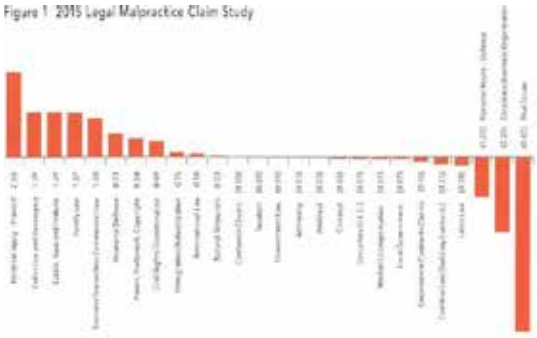
5. When It's Time to Say Good-Bye to A Client, Godspeed, Safe Travels

a. By reference to the "Milestones"-when the agreed mission is complete.

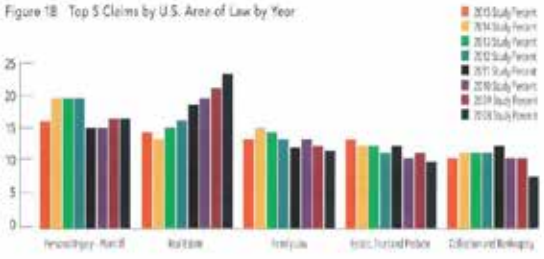
b. After discharge unless client's prized possessions are in controversy.

c. When the attorney-client relationship has deteriorated and withdrawal is indicated-but in full compliance with ethical mandates.

d. When the case is closed.



Perhaps not surprisingly, given the difficult economic times preceding the period covered by the 2015 Study, claims in the Collection and Bankruptcy area increased another 1.39 percent after a dramatic increase of 1.93 percent between the 2007 and 2011 Studies. This ongoing increase occurs after years of an overall decline in this area since 1985. On the other hand, the Corporate/Business Organization area declined by 2.35 percent after an increase of 1.65 percent in the 2011 Study, bringing it back in line with its level from the 2007 Study. Rounding out the top increasing areas of claims is Estate, Trust and Probate, which had its largest increase since 1985 of 1.39 percent, raising it into double-digit percentage representation (10.07 percent) for the first time ever.



Closer examination of the year-over-year trends in the top five claims areas in Table 18 reveals a more detailed look at how activity has evolved across this and the prior study's periods. In the Personal Injury—Plaintiff area, we see a "hump" in claims activity occurring between 2011 and 2014, with a peak in 2013 and then a return to its 2008 level in 2015. A similar "hump" in the Collection and Bankruptcy area is also observed between 2008 and 2015, peaking in 2011, though its level in 2015 is still appreciably higher than in 2008 (10.16 percent vs. 6.98 percent). It will be interesting to see whether claims in this area will continue a downward trend in the 2019 Study.

A clear downward trend is in the Real Estate area, dramatically declining from 2008's 23.36 percent to bottom out in 2014 at 13.44 percent. Contrast that, however, with a steady, year-over-year upward trend in Estate, Trust and Probate between 2008 and 2015. Should both of these trends continue, it is likely that Estate, Trust and Probate will, for the first time since the 1985 Study, move up into either the third—or even, perhaps, second—most claims-generating area of law.

The trends shown in Table 18 include only the participating U.S. firms. To compare these trends with those from Canada, refer to Table 18 in Appendix B.

151 Ariz. 403 (1986)
40

728 P.2d 273

Harvey R. McELHANON, Jr., and Doreen T. McElhanon, his wife, Plaintiffs-Appellees Cross-Appellants, v. Robert Ong HING and Alice Hing, his wife, Defendants-Appellants Cross-Appellees.

No. CV 86 0128-PR.

Supreme Court of Arizona, En Banc.

November 3, 1986.
Reconsideration Denied December 16, 1986.

405*405 Jack E. Evans, Ltd. by Jack E. Evans, Phoenix, for plaintiffs-appellees cross-appellants.

Feinstein Halstead & Leonard, P.A. by Allen L. Feinstein, R. Stewart Halstead, Phoenix, for defendants-appellants cross-appellees.

FELDMAN, Justice.

This case arises from a series of actions alleging fraud, embezzlement, and conspiracy surrounding the formation of a corporation in 1970. In this particular case, plaintiff (petitioner **McElhanon**), a judgment creditor, alleged a conspiracy to defraud and named the judgment debtor's attorneys as defendants. The sole issue before us is whether an ex parte conference between the trial judge, plaintiff, and plaintiff's attorney requires reversal of a jury verdict in plaintiff's favor. The court of appeals held that the trial judge erred in denying a mistrial motion based on the ex parte contact. ***McElhanon** v. **Hing***, 151 406*406 Ariz. 386, 400, 728 P.2d 256, 270 (1985). We accepted review pursuant to Rule 23, Ariz.R.Civ.App.P., 17A A.R.S. We have jurisdiction under Ariz. Const. art. 6, § 5 and A.R.S. § 12-120.24.

I. FACTS

A. *The Underlying Transaction*

In the summer of 1970, Harvey R. **McElhanon**, Jr. (**McElhanon**), John H. Greer, Jr. (Greer), and Charles Gilbert Harris (Harris) purchased stock in several corporations that acquired and operated four restaurants. The first restaurant purchased, Pinnacle Peak Patio, became the principal asset of Southwest Restaurants Systems, Inc. (Southwest), a new corporation formed by **McElhanon**, Greer, and Harris. All three principals contributed cash for the Pinnacle Peak Patio transaction. Although only **McElhanon** and Greer contributed cash for stock in the other corporations, each of the three men became owners of one-third of the stock in all the corporations. In return for **McElhanon's** and Greer's disproportionate capital contributions, Harris agreed to pay for his stock out of the corporations' profits. A formula was devised to determine the amount of Harris's obligation to **McElhanon** and Greer; the men agreed that the obligation would be forgiven if there were no profits.

B. ***McElhanon** v. Harris and Greer*

In the fall of 1970, disputes arose among the three shareholders. **McElhanon** filed suit against Harris, Greer, and the corporations, demanding payment of $250,000 based on the formula and Harris's prior promise to pay his debt from profits. **McElhanon** also sought damages against Greer for maliciously interfering with Harris's obligation to pay and for committing, with Harris, acts of malfeasance and misfeasance in operating the corporations.

Shortly after the suit was filed, John Grace (Grace), counsel for Greer and Harris, began consulting with attorney **Robert** Ong **Hing** (**Hing**), defendant in this case. In September 1973, **McElhanon's** lawsuit against Greer and Harris went to trial with **Hing** representing Greer and Harris. On October 11, the jury returned a $200,000 verdict for **McElhanon** against Harris based on the repayment formula. The jury found Greer not liable. The following day, October 12, 1973, judgment on the verdict was entered in favor of **McElhanon** and against Harris.

The sequence of events following the verdict led to **McElhanon's** present claim against **Hing**. **McElhanon** alleges that after being informed of the verdict, Greer and Harris went to **Hing's** office to discuss the matter. **Hing** knew that Harris's only asset was his interest in Southwest. **McElhanon** alleged that to prevent collection of the judgment, Greer and Harris decided to have Greer purchase Harris's stock. **Hing** prepared a sale agreement to that effect. Harris's stock certificate in Southwest was cancelled and a new stock certificate was issued in Greer's name. The transaction was completed by October 13, 1973, the day after entry of judgment. As security for his legal fees from Greer and Harris, **Hing** retained Greer's Southwest stock certificates, the agreement between Greer and Harris, and the Greer-to-Harris note and assignment. **McElhanon** later claimed that the transfer of stock from Harris to Greer and **Hing's** assertion of an attorney's lien on the stock and the proceeds of the transfer were fraudulent transactions facilitated by **Hing** and Grace.

On October 20, **McElhanon** served a writ of garnishment naming the corporations as garnishee-defendants. When the writ was answered, **McElhanon** learned that Harris's stock had been transferred to Greer, that Greer was indebted to Harris, and that **Hing** claimed an attorney's lien on the proceeds. **McElhanon** sought to set aside the sale of stock from Harris to Greer. **Hing** opposed **McElhanon**, arguing that Harris was not insolvent. **McElhanon** claims that **Hing** knew this to be untrue. Eventually, the order to show cause was dismissed. On November 14, Harris appealed the judgment 407*407 against him.[1] While the appeal was pending, Southwest filed a reorganization petition under Chapter XI of the Bankruptcy Act and Harris and Greer filed voluntary bankruptcy petitions.

In the bankruptcy proceedings, **McElhanon** sought a determination that he was entitled to a judgment lien on the stock that Harris had sold to Greer. The law firm of Stockton and **Hing** opposed **McElhanon's** claim, arguing that it had a prior right to the stock by way of a retaining lien for its fees. It also claimed that Southwest was indebted to it for services rendered in defending **McElhanon's** action against Harris and Greer. Eventually, the bankruptcy court ruled that the October 13 stock transfer was a fraudulent conveyance and that the stock in Southwest was an asset of Harris's estate. The court also ruled that **Hing** had no claim against Southwest for legal services. These and other findings were upheld on appeal. *In re Southwest Restaurant Systems, Inc.,* 607 F.2d 1241 (9th Cir.1979); *In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1243 (9th Cir.1979), *cert. denied,*444 U.S. 1081, 100 S.Ct. 1035, 62 L.Ed.2d 765 (1980).

C. *The Present Action*

***McElhanon** v. **Hing**, Grace, and Greer*

McElhanon filed the present case on September 23, 1975. He alleged that **Hing**and Grace had conspired with Harris and Greer to defraud him and had taken affirmative steps to hinder and prevent execution on his 1973 judgment against Harris. The trial was long and bitter; emotions engaged the attorneys as well as the parties. Toward the end of trial, the judge informed defendants' counsel that he wished to have a private meeting with plaintiff and his attorney. There was no objection, and the meeting took place in the judge's chambers. The subjects discussed went beyond those originally proposed by the judge. Defendants eventually moved for a mistrial, but the judge denied the motion and the trial continued. The jury was instructed that they could find against **Hing** if they found that he *knowingly* assisted his clients, Harris and Greer, to commit a fraud on **McElhanon**. Fraud was defined as "action of an affirmative, evil nature, such as ... acting dishonestly, intentionally, maliciously and deliberately, with a wicked motive to deceive and cheat...." On August 14, 1980, the jury returned a verdict of $286,120.

Implicit in the jury verdict is a finding that the stock transfer and lien transactions between Harris, Greer, and **Hing** were intentionally fraudulent. With respect to Harris and Greer, this finding is strengthened by the holdings in the two bankruptcy matters, *In re Southwest Restaurant Systems, Inc., supra,* and *In re Southwest Restaurant Systems, Inc., supra*. As far as **Hing's** knowledge is concerned, we agree with the conclusion of the court of appeals:

The circumstancial evidence [at trial] strongly indicates that **Hing**drafted the stock transfer agreement and participated in the transfer discussion, knowing that Harris was or would be rendered insolvent, knowing that Greer was financially unstable if not insolvent, knowing that the consideration was inadequate and that the stock transfer agreement itself was a sham, and with the actual intention on **Hing's**part of hindering, delaying, and defrauding **McElhanon**. Additionally, based upon the delay occasioned by **Hing's** acts and those of his co-conspirators, including the looting of the corporation by the co-conspirators, the value of the stock subsequently decreased so as to give rise to a cause of action for money damages by **McElhanon**....

151 Ariz. at 395, 728 P.2d at 265.[2]

After judgment was entered against **Hing** and Grace, **McElhanon** settled with Grace and agreed not to execute against 408*408 him. **Hing's** motions for a new trial and for judgment notwithstanding the verdict were denied and he appealed. **McElhanon** also appealed on the issue of damages.

D. *Decision of the Court of Appeals*

The court of appeals decided numerous issues, only one of which is before us. First, it determined that a cause of action lies against a judgment debtor's attorney who conspires to defraud the judgment creditor. The court found sufficient evidence to support the finding that **Hing** knowingly participated in such a conspiracy. At 395, 728 P.2d at 265. It then determined that the proper measure of damages was the value of the property fraudulently conveyed or the amount of the debt, whichever was less. *Id.* at 394, 728 P.2d at 264. The court found that all elements of the tort were adequately stated in the instruction. *Id.* at 396, 728 P.2d at 266.

On procedural issues, the court held that the trial judge did not abuse his discretion when he denied **Hing's** motion to sever the case. It further held that Evans, **McElhanon's** trial counsel, had acted improperly by repeatedly mentioning the prior bankruptcy judgment in front of the jury. However, relying on *Grant v. Arizona Pub. Serv.,* 133 Ariz. 434, 454, 652 P.2d 507, 527 (1982), the court of appeals found that the trial judge did not abuse his

discretion in denying a mistrial because Evans's misconduct had not influenced the verdict.[3] 151 Ariz. at 399, 728 P.2d at 269. We approve the foregoing holdings together with the supporting analysis.

The court of appeals then reached the issue under review. It decided that the trial judge's denial of the mistrial motion based on ex parte contacts was an abuse of discretion. Addressing only that issue, we turn first to the specific facts surrounding the conference.

E. *The Ex Parte Contacts*

In the fourth week of trial Evans attempted to impeach defendant **Hing** with prior deposition testimony. **Hing** objected to some of Evans's questions. His objection was sustained, possibly because the trial judge misunderstood Evans's question to the witness. A recess was called. In chambers, with all parties present, Evans objected strenuously, claiming that the judge was hostile to him and that this hostility was being communicated to the jury. He also took umbrage at a perceived accusation that he was guilty of misrepresenting the facts. A heated exchange occurred.

The next morning, the judge read the disputed portions of the record. Evidently wishing to spread oil on troubled waters, he told defense counsel that he was going to have a private conference with **McElhanon** and Evans to explain that he did not believe Evans was guilty of any ethical improprieties. Defense counsel made no objection. **McElhanon** and Evans were alone with the judge in chambers. However, at Evans's request a court reporter transcribed the proceedings.

The judge explained that he was not accusing Evans of improprieties. His feelings not assuaged, Evans expanded the subject of the conference by accusing **Hing**and his counsel of perjury. **McElhanon** also related hearsay about one of the defendants lying on the witness stand and accused both Grace and **Hing** of fraud. He requested that bar proceedings be brought against defendants and defense counsel. The judge explained that "my [only] role in this case is to insure that plaintiff and defendants get a fair trial...."

After a short recess, counsel for all parties met in the judge's chambers. The judge apologized for any accusations of impropriety against Evans and described the serious allegations of perjury and subornation that had been made against defendants. Defense counsel requested that 409*409 the judge avoid further ex parte discussions. The court reporter read the transcript of the previous discussion. The proceedings then adjourned at defense counsel's request.

Defense counsel subsequently argued that the ex parte proceedings had violated the Code of Judicial Conduct and had affected the judge's view of the case. He questioned the judge's impartiality. The judge stated that the allegations of perjury were irrelevant to the matter before him and that he felt unaffected by plaintiff's allegations. However, the judge conceded that he was concerned about appearances, and that he wanted to ensure both sides a fair trial. Defense counsel moved for a mistrial on grounds of impropriety and judicial misconduct. The judge declared a recess to discuss the matter with the presiding judge.

When the court reconvened, the judge repeated his previously expressed views but, fearing an appearance of impropriety, he also stated that he was inclined to grant the motion for a mistrial. Evans urged the judge to reconsider his decision. He claimed that it would be a miscarriage of justice to retry the case a month into the trial when the jury knew nothing of the events and the judge had repeatedly stated that his view of the case was unaffected. The judge then denied the motion for mistrial, stating that he found no clear violation of

professional conduct, that he had invested an enormous amount of work in the case, and that his impartiality was unaffected by the allegations.

II. DISCUSSION

A. *Improprieties in the Proceedings*

The court of appeals held that the ex parte conference was improper. At 401-402, 728 P.2d at 271-272. We agree. The rule is that

"[e]xcept as authorized by law, [a judge should] neither initiate nor consider ex parte applications concerning a pending or impending proceeding."

Canon 3(A)(4), Code of Judicial Conduct, Rule 81, Ariz.R.S.Ct., 17A A.R.S.; *see also Roberts v. Commission on Judicial Performance,* 33 Cal.3d 739, 747, 661 P.2d 1064, 1068, 190 Cal. Rptr. 910, 914 (1983); *In re Fisher*, 31 Cal.3d 919, 647 P.2d 1075, 184 Cal. Rptr. 296 (1982); *Matter of Berk,* 98 Wis.2d 443, 297 N.W.2d 28 (1980). The rule is unaffected by the judge's good faith belief that he had been hasty in chastising plaintiff's attorney. One reason such contacts are improper is that no matter how pure the motive any ex parte contact may allow the judge to be improperly influenced or inaccurately informed. *In Re Conduct of Burrows,* 291 Or. 135, 145, 629 P.2d 820, 826 (1981).

The error was not cured by the judge either telling opposing counsel of his intentions or obtaining consent for the ex parte contact. Counsel reasonably might feel constrained from objecting to the judge's request for a conference. Canon 3(A)(4), *supra,* does not permit the judge to solicit a party's consent for the judge's ex parte discussions with another party; rather, it prohibits the judge from initiating ex parte communications about the pending case. In our view, the judge's solicitation of consent is a form of initiation. Nor can we give weight to the judge's desire to apologize to counsel for a misunderstanding. If a judge wishes to mend his fences during trial, he must invite all parties inside the gate. The events that took place in this case illustrate the dangers of even innocently conceived ex parte meetings.

The court of appeals correctly noted that the judge was not alone in acting improperly. 151 Ariz. at 401, 728 P.2d at 271. Evans never should have agreed to the ex parte conference. DR 1-103, 7-110(B), Rule 29(a), Ariz.R.S.Ct., 17A A.R.S.[4] Furthermore, Evans's *expansion* of the content of the ex parte contact to include perjury allegations was improper. 410*410 He also had a duty to restrain his client from injecting potentially prejudicial hearsay into the conversation. *Cf.* DR 7-110(B).[5] We understand, but cannot condone, the reluctance of an attorney to refuse to confer when "requested" to do so by the trial judge.

B. *Is Reversal Required?*

The court of appeals held that when the trial judge denied the motion for a mistrial, he "lost control of the case and there could no longer be a fair and impartial trial." At 400, 728 P.2d at 270. The court held that the ex parte contacts were unauthorized by law and "totally destroyed the sanctity of a fair trial." *Id.* at 401, 728 P.2d at 271. It also found that the impropriety had affected the outcome of the trial because, after the ex parte conference, the judge changed his mind and submitted the punitive damage issue to the jury. *Id.* at 402, 728 P.2d at 272.

Thus, the court of appeals made two related holdings. First, prejudice was presumed because of the nature of the improprieties. Second, "the impropriety of this ex parte

proceeding [may have] affected the outcome of the trial," *id.* at 402, 728 P.2d at 272, thereby prejudicing defendant.

1. *Presumed Prejudice*

The court of appeals relied on *Grant v. Arizona Pub. Serv., supra*. We reaffirm in the strongest terms our statement in *Grant* that we will not hesitate to require retrial when a trial judge loses control of a case and allows counsel to engage in conduct that precludes a fair trial. The issue is whether a fair trial was possible in this case.

Grant considered cases in which prejudice was presumed. For example, in *Love v. Wolf,* 226 Cal. App.2d 378, 38 Cal. Rptr. 183 (1964), prejudice could not be demonstrated, but a serious impropriety had occurred without the court admonishing the jury. The record in *Love* showed that the court had lost control of the entire proceedings, allowing counsel to engage in conduct described by the appellate court as "egregious beyond any in our experience or ... related in any reported case...." 226 Cal. App.2d at 382, 38 Cal. Rptr. at 184. *Grant* held that under such circumstances, prejudice could be presumed and that we would "have no hesitancy in finding that denial of a motion for a new trial was an abuse of discretion." 133 Ariz. at 456, 652 P.2d at 529; *see also Simmons v. Southern Pacific Transp. Co.,* 62 Cal. App.3d 341, 133 Cal. Rptr. 42 (1976); *Ice v. Commonwealth,* 667 S.W.2d 671 (Ky. 1984) (judge allowed numerous acts of prosecutorial misconduct, including permitting the state to call a minister to testify in rebuttal that the death penalty was approved by biblical teaching and that jurors would be condemned by God if they failed to recommend defendant's execution), *cert. denied,* 469 U.S. 860, 105 S.Ct. 192, 83 L.Ed.2d 125 (1984).

In this case, all improprieties occurred outside the jury's presence. The jury was never aware that anything untoward had occurred. Except for the one ex parte conference, serious as it was, the trial judge did not permit continual episodes of misconduct by counsel. Unlike *Love* and *Ice,* the trial judge here sustained well-taken objections, struck improper remarks, and properly admonished and instructed the jury. Except for the ex parte conference, the record shows a trial judge who kept control of a very difficult case, rather than one who lost control. In a long and hard fought case, even "[s]killed advocates are not always endowed with `high boiling points.'" *Love v. Wolf,* 226 Cal. App.2d at 393, 38 Cal. Rptr. at 192. This was not a case where loss of control created a virtual 411*411 mockery of the concept of a fair and impartial trial. *Cf. Love v. Wolf, supra.* We do not believe the rule of presumed prejudice mentioned in *Grant* is applicable.

2. *Appearance of Impropriety*

Hing argues that reversal is required because the appearance of impropriety affected the integrity of the judicial process. Even where there is no actual bias, justice must appear fair. *State v. Romano,* 34 Wash. App. 567, 569, 662 P.2d 406, 407 (1983) (citing *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)). By definition, ex parte contacts are rarely on the record and, therefore, are usually unreviewable. Thus, such contacts cast doubt upon the adversary system and give the appearance of favoritism. *See In re Burrows,* 291 Or. 135, 145, 629 P.2d 820, 826 (1981).

We do not believe the events that occurred here threaten the integrity of the judicial process. The trial judge gave notice of his intentions and no objection was made. When the ex parte conference ended, the trial judge immediately notified the opposing parties of the plaintiff's accusations and the expanded scope of the ex parte proceeding. The transcript of that proceeding was read to defendants and they were allowed to respond. Arguments were

had over the propriety of the ex parte conference. The judge reiterated his statements of impartiality and repeatedly stated that he viewed the allegations against **Hing** as irrelevant to the issues before him.

In *State v. Brown,* 124 Ariz. 97, 602 P.2d 478 (1979), we reversed a verdict entered after a trial judge had initiated ex parte conversations with a prosecutor concerning possible perjury. The judge insisted, on more than one occasion, that perjury charges be brought against a defendant because he was offended that the perjury was so blatant. Defense counsel was not notified about the ex parte contacts until the judge had revoked defendant's bond.

We do not believe *Brown* controls this case. In *Brown,* the judge "gave the appearance of abandoning his role as a fair and impartial judge" and began "to act in the dual capacity of judge and advocate." 124 Ariz. at 100, 602 P.2d at 481. We held that reversal is required when a judge becomes so personally involved that there is an appearance of hostile feeling, ill will, or favoritism toward one of the litigants. *Id.* No such appearance was given in this case. *Compare State v. Mincey,*141 Ariz. 425, 444, 687 P.2d 1180, 1199 (judge had ex parte contact regarding the difficulty of sentencing), *cert. denied,* 434 U.S. 1343, 105 S.Ct. 521, 54 L.Ed.2d 56 (1984) *with State v. Valencia,* 124 Ariz. 139, 140-41, 602 P.2d 807, 808-09 (1979)(relative of victim had private conversation with judge and urged imposition of death sentence; the judge told no one, no contemporaneous record was made, and the information imparted pertained to *facts* relevant to the sentencing procedure).

The present case is similar to *State v. Perkins,* 141 Ariz. 278, 686 P.2d 1248 (1984). In *Perkins,* we noted that the trial judge "remained neutral and did not make a judgment" after receiving letters alleging perjury from a codefendant. 141 Ariz. at 286, 686 P.2d at 1256. The trial judge informed counsel that he would provide a fair trial and that counsel would have to use his own judgment regarding the use of potentially perjured testimony. 141 Ariz. at 286-87, 686 P.2d at 1256-57. We held that the judge showed no prejudice, especially because he conferred with other judges after receiving the letters and then told all counsel involved. *Id; see also United States v. Jackson,* 430 F.2d 1113 (9th Cir.1970) (revocation of bail bond on information received in ex parte communication did not require disqualification).

Here, as in *Perkins,* the judge never lost the appearance of impartiality. In his efforts to remain neutral, he even consulted the presiding judge, a completely proper course of conduct. *See* Canon 3(A)(4), Code of Judicial Conduct, Rule 81, Ariz.R.S.Ct., 17A A.R.S.; *State v. Perkins,* 141 Ariz. at 287, 686 P.2d at 1257; *Gaston v. Hunter,* 121 Ariz. 33, 59, 588 P.2d 326, 352 (1978).

412*412 Appearances might have been different if the events that transpired at the ex parte conference had been hidden from defendants. However, the contemporaneous *record* shows that when plaintiff, not the judge, expanded the scope of the conference, the judge asserted his independence and impartiality and then terminated the conference, promptly informing defendants of the allegations made against them. Thus, unlike *State v. Valencia,* the ex parte communication did not provide the judge with new and unrebutted factual information on the very issues that he was to decide. While the conference was improper, *see ante* at 396, 728 P.2d at 266, we do not believe the essential fairness of the entire proceeding was left in question. No appreciable doubt was cast upon the integrity of the judicial process.

Defendant argues that the nature of the accusations made to the judge at the ex parte conference were calculated to adversely influence his views of the defendant and,

therefore, the appearance of impropriety rule requires reversal. We disagree. The accusations did not come as a surprise to the judge; similar charges had been made in open court. A judge often hears prejudicial evidence, allegations, or accusations against one party. Judges are trained to hear and consider such information and, if they find it irrelevant or inadmissible, to put it aside and discharge their duties in accordance with the law. We need not reverse merely because the judge heard the derrogatory comments made by **McElhanon** in chambers. If reversal would be required here, then a similar argument could have been made when the judge heard **McElhanon's** comments in open court, or if he had heard extremely prejudicial evidence in a motion to suppress and ruled it inadmissible. *United States v. Meinster,* 488 F. Supp. 1342, 1348-49 (S.D. Fla. 1980), *aff'd,* 664 F.2d 971 (5th Cir.1981), *cert. denied,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).

Defendant argues that justice must not only be done fairly but that it must be perceived as having been fairly done. We agree. Anything else tends to undermine public confidence in the judicial system. This principle, however, does not help defendant in the case at bench. The transactions giving rise to this case commenced almost seventeen years ago. The first legal action was filed over fifteen years ago. The alleged conspiracy formed at **Hing's** office occurred thirteen years ago. The case now before us was filed eleven years ago. During this period of time, the parties have been involved in at least three superior court lawsuits, two of which were tried, one arbitration proceeding, and three hotly contested adversary trials in bankruptcy court. There have been five federal appeals,[6] three appeals in our appellate system, and two previous petitions for review by this court.[7] There have been five petitions in this court seeking extraordinary relief by special action.[8] There have been two petitions for writ of certiorari from the United States Supreme Court.[9]

The parties have had more than their day in court. There comes a time when every case must end; otherwise, the process becomes more important than the resolution. We would not affirm the verdict if a significant appearance of judicial impropriety existed. 413*413 However, we believe that given the long history of this case, reversal based on mere appearance of impropriety, without any actual prejudice, would significantly undermine the integrity of the judicial system. This sequel to the saga of the Hatfields and McCoys has had all of the scrutiny that the judicial system can afford. It is time to put an end to this affair unless the impropriety actually prejudiced the result.

3. *Actual Prejudice*

Finally, therefore, we must determine if there is a reasonable probability that defendant was prejudiced as a result of the ex parte communication. *State v. Brown,* 124 Ariz. 97, 100, 602 P.2d 478, 481 (1979); *see also State v. Packett,* 206 Neb. 548, 552, 294 N.W.2d 605, 608 (1980).

Defendant argues that prejudice can be found because, after the perjury accusation made at the ex parte conference, the judge decided to give a punitive damages instruction. We disagree. When asked earlier in the trial, the judge had stated that sufficient evidence had not yet been produced to warrant an instruction on punitive damages. After the conference and by the close of **McElhanon's** case, he had changed his mind. If the jury had awarded punitive damages there might be some force in the argument that a significant possibility of prejudice existed when the judge decided to give the punitive damage instruction. However, the jury awarded *no* punitive damages. Therefore, there is no possibility that defendant sustained prejudice.

The verdict was obviously not the result of passion or prejudice. The jury denied all punitive damages and brought in a verdict well within reason on the compensatory claim. The verdict of $286,000 is not based on intangible items such as pain and suffering; it is the approximate amount of the loss sustained by **McElhanon**because of his inability to collect the $200,000 judgment awarded against Harris in 1973. As the court of appeals indicated, 151 Ariz. at 394, 728 P.2d at 264, the trial court correctly instructed that the amount of damages recoverable was limited to the amount of the antecedent debt which **McElhanon** was unable to collect from Harris plus incidental expenses. The compensatory damages awarded were within the limits of the court's instructions and of *defendant's own* proposed jury instruction. No possible bias affecting the jury instructions has been demonstrated. The key instructions on the legal issues were correct statements of the law. Of more than forty instructions given to the jury, all but one were in the form submitted by defendant. The misconduct did not prejudice defendant.

III. CONCLUSION

Review of the entire record leads to the inescapable conclusion that at long last justice in this case has been done. Ariz. Const. art. 6, § 27. All parties have had their day in court and it is time to bring this matter to a final conclusion. We approve the decision of the court of appeals except as to its determintion that reversal was required because of the ex parte communications. That portion of the opinion is vacated. The judgment of the trial court is affirmed.

HOLOHAN, C.J., GORDON, V.C.J., and HAYS and CAMERON, JJ., concur.

[1] The judgment was eventually affirmed, *sub nom., Perry v.* ***McElhanon****,* No. 1 CA-CIV 2635 (Ariz. Ct. App. Sept. 9, 1976) (memorandum decision).

[2] For those who wish to learn even more of the sad history of this affair, *see United States v. Greer,*607 F.2d 1251 (9th Cir.), *cert. denied,* 444 U.S. 993, 100 S.Ct. 526, 62 L.Ed.2d 423 (1979).

[3] Whatever the extent of the impropriety in Evans's references to the bankruptcy proceeding, that impropriety presumably was rendered harmless when the judgments in bankruptcy were subsequently admitted in evidence.

[4] The events in question occurred prior to adoption of the Rules of Professional Conduct, Rule 42, Ariz.R.S.Ct., 17A A.R.S. Therefore, disciplinary rules are cited to the Code of Professional Responsibility, Rule 29(a), Ariz.R.S.Ct., 17A A.R.S.

[5] We can criticize **McElhanon** almost to the same extent as Evans. The judge invited **McElhanon** to a private conversation and **McElhanon** was led into the inner sanctum by his own attorney. While most laymen might feel it was perfectly proper to take advantage of the golden moment to make the judge see the true nature of the opposition, it is fair to assume that **McElhanon**, who by virtue of this series of disputes has more litigation experience than most lawyers, knew better. In addition, **McElhanon** made racial slurs about **Hing**. We condemn his remarks.

[6] *In re Southwest Restaurant Systems, Inc.,* 607 F.2d 1237 (9th Cir.1979); *In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1241 (9th Cir.1979); *In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1243 (9th Cir.1979) *cert. denied,* 444 U.S. 1081, 100 S.Ct. 1035, 62 L.Ed.2d 765 (1980); *In re Southwest Restaurant Systems, Inc.,* 607 F.2d 1248 (9th Cir.1979); *United States v. Greer,* 607 F.2d 1251 (9th Cir.), *cert. denied,* 444 U.S. 993, 100 S.Ct. 526, 62 L.Ed.2d 423 (1979).

[7] ***Hing*** *v. Southwest Restaurant Systems, Inc.,* 1 CA-CIV 4058 (Ariz. Ct. App. Mar 1, 1979) (memorandum decision); *Perry v.* ***McElhanon****,* 1 CA-CIV 2635 (Ariz. Ct. App. Sept. 9, 1976) (memorandum decision); and the present case.

[8] ***McElhanon*** *v. Superior Court,* Supreme Court No. 11505 (1974); ***McElhanon*** *v. Superior Court,*Supreme Court No. 11557 (1974); ***McElhanon*** *v. Superior Court,* Supreme Court No. 12462 (1976); ***Hing*** *v. Chatwin,* Supreme Court No. 13208 (1977); ***Hing*** *v. Chatwin,* Supreme Court No. 13690 (1978). Jurisdiction was declined in each case.

[9] *See* note 6, *supra.*

Select US Bankruptcy Sections, 11 United States Code

§ 101. Definitions

In this title the following definitions shall apply:
* * *
(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $192,450.
* * *
(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or Select who is a bankruptcy petition preparer under section 110, but does not include—

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;
(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;
(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;
(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or
(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

* * *
§ 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.[1]

[1] But see Milavetz, Gallop & Milavetz v. U.S., 130 S. Ct. 1324 (2010); Hersh v. ex rel. Mukasey, 553 F.3rd 743 (5th Cir. 2008).

(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.

* * *

§ 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.

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, and in some cases a statement of intention need to be prepared correctly and filed with the bankruptcy court. You will have

to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice."

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including—

(1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

(2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

(d) A debt relief agency shall maintain a copy of the notices required under subsection (a) of this section for 2 years after the date on which the notice is given the assisted person.

* * *

§ 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;

(3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

(b)(1) An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public includes—

(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and

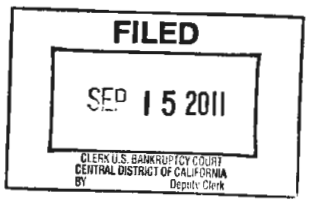
(B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.

(2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall—

(A) disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and

(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

*** * ***



UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re ATTORNEY DISCIPLINE PROCEDURES IN BANKRUPTCY COURT	**FOURTH AMENDED GENERAL ORDER 96-05**

Applicability

This general order establishes a process for court wide discipline of attorneys in the bankruptcy court.

These procedures shall apply when any judge of this court wishes to challenge the right of an attorney to practice before this court or recommends the imposition of attorney discipline intended to apply in all bankruptcy cases in this court.

Nothing in this general order is intended to limit or restrict the authority of any judge to impose sanctions on any attorney in any case or cases assigned to that judge.

Initiation of Disciplinary Proceedings

If a bankruptcy judge wishes to initiate disciplinary proceedings under this general order, that judge (the "Referring Judge") shall prepare and file with the Clerk of Court a

written Statement of Cause setting forth the judge's basis for recommending discipline and a description of the discipline the referring judge believes is appropriate.

The clerk shall open a case file, assign a miscellaneous case number, initiate a docket for the file, select three bankruptcy judges of this district at random (excluding the judge who filed the Statement of Cause) to serve on the Hearing Panel (the "Panel") which will determine whether the attorney shall be disciplined and, if so, the type and extent of discipline. The most senior judge assigned to the Panel shall be the Presiding Judge. The clerk shall prepare a Designation of Hearing Panel and Presiding Judge which shall include a signature line for each of the designated judges. The signature of each judge shall certify his or her acceptance of assignment to the Panel. Should any judge decline to serve, the clerk shall select another judge to serve on the Panel, give written notice thereof to the other judges on the Panel and issue a Supplemental Designation of Hearing Panel, which shall contain a signature line for the newly appointed judge to accept the assignment.

Once the clerk has obtained the acceptance of three judges to serve on the Panel, the clerk shall prepare a Notice of Assignment of Hearing Panel, which the clerk will serve on the attorney named in the Statement of Cause ("the attorney") and on the local Office of the United States Trustee, along with a copy of the Statement of Cause and a copy of this general order. The attorney may file a motion for recusal as to any of the judges assigned to the Panel within 14 days of the service of the Notice of the Assignment of Hearing Panel and serve the motion on the Office of the United States Trustee. That motion may be heard by any judge other than the referring judge, any judge assigned to the Panel, or any judge who has declined to serve on the Panel. The assignment of the recusal motion to a judge shall be made at random by the clerk, who shall give notice of the recusal hearing to the attorney and to the Office of the United States Trustee at least 14 days before the hearing date.

Once the period for bringing a recusal motion has terminated, or after disposition of any recusal motion, the Presiding Judge shall advise the clerk of the date, time, and place for the Disciplinary Hearing, whereupon the clerk shall prepare a Notice of Disciplinary Hearing and mail the notice to the attorney and to the Office of the United States Trustee at least 21 days before the hearing date.

Additional Input

The Panel or any member thereof may request additional information concerning the conduct of the attorney in the subject case or any other case from the Referring Judge, the United States Trustee and/or another judge(s) in this district. Any such request (a "Request") shall be writing and shall be filed in the disciplinary proceeding and served on all members of the Panel, the attorney, the United States Trustee and the party or parties to whom the Request is directed. The Request shall specify a deadline for the response.

Any response(s) to a Request (a "Response") shall be in writing and shall be filed in the disciplinary proceeding and served on all members of the Panel, the attorney and the United States Trustee. The attorney may file a written reply to a Response within 7 days after service of the Response. A copy of the reply shall be served on all members of the Panel, the United States Trustee and the party who filed the Response.

Except in a Response or as otherwise authorized in this Order, the Referring Judge shall not communicate with the Panel concerning the merits of a pending disciplinary proceeding.

Hearing Procedures

The attorney may appear at the Disciplinary Hearing with legal counsel and may present evidence:

(A) Refuting the statements contained in the Statement of Cause;

(B) Refuting the statements contained in a Response;

(C) Mitigating the discipline (i.e., that, notwithstanding the validity of the statements in the Statement of Cause or a Response, the attorney should not be disciplined); and

(C) Bearing on the type and extent of disciplinary action appropriate under the circumstances.

The Federal Rules of Evidence shall apply to the presentation of evidence at the Disciplinary Hearing, and an official record of the proceedings shall be maintained as through the Disciplinary Hearing were a contested matter as that term is defined in the Federal Rules of Bankruptcy Procedure. The United States Trustee for the district may appear at the hearing in person or by counsel and may participate in the presentation of evidence as though she or he were a party to the proceeding. If the United States Trustee wishes to appear at the hearing, she or he must file a Notice of Intent to Appear, setting forth the purposes for the appearance, and serve that notice on the attorney at least 14 days before the hearing. The Panel may disregard written statements or declarations of innocence or in mitigation of the attorney's conduct unless they are filed with the court with copies delivered promptly thereafter to the chambers of each member of the Panel at least 7 days prior to the hearing. Written statements presented to the Panel for consideration as evidence by or on behalf of the attorney may be disregarded by the Panel if the declarant is unavailable at the hearing for cross-examination and for examination by the Panel.

Ruling

At the conclusion of the Disciplinary Hearing, the judges of the Panel will adjourn to a private session to consider the matter. The ruling of the Panel will be made by majority vote of the judges on the Panel. The Presiding Judge will assign to a judge in the majority the task of drafting the Panel's Memorandum of Decision setting forth the

majority's decision and its reasons. Any member of the Panel may issue a concurring or dissenting opinion which will be made a part of the Memorandum of Decision.

If the Panel imposes discipline on an attorney, the Presiding Judge shall issue a Discipline Order based on the Panel's Memorandum of Decision. That order may provide for any appropriate discipline, including but not limited to revocation or suspension of the right to practice before all the judges of this court. A copy of the entered Discipline Order shall be served on the attorney, all judges of the United States Bankruptcy Court for the Central District of California (excluding any judges who elect not to receive copies of such orders) and the United States Trustee. The attorney, the Referring Judge and/or the United States Trustee may file a motion for rehearing, clarification or more detailed findings (a "motion for rehearing") within 14 days after entry of the Discipline Order. (Nothing contained in this order precludes the Panel appointed in a given disciplinary proceeding from concluding that a Referring Judge lacks standing to file a motion for rehearing.)

The Discipline Order will become final 14 days after entry or, if a motion for rehearing is filed, 14 days after entry of an order denying the motion for rehearing. The same rule as to finality will apply to a new or revised Discipline Order, if one is issued by the Panel after rehearing.

The Discipline Order shall be sent by the clerk to the Clerk of the District Court. Should the Panel so order, a Discipline Order also may be transmitted by the clerk to the State Bar of California or published in designated periodicals, or both.

If an attorney's practice privileges have been revoked, modified, or suspended by final order of a Panel, the attorney may not appear before any of the judges of this court representing any other persons or entities except in compliance with the terms of the Discipline Order.

Reinstatement

An attorney whose privileges have been revoked, modified, or suspended under this general order may apply to the Chief Judge of this court for reinstatement of privileges on the following schedule:

(A) If privileges were revoked without condition for an unlimited period of time, the attorney may apply for reinstatement after five years from the date the Discipline Order becomes final;

(B) If privileges were revoked or suspended with specified conditions precedent to reinstatement, the attorney may apply for reinstatement upon fulfillment of the conditions set forth in the Discipline Order; and

(C) If privileges were suspended for a specified period of time, the attorney may apply for reinstatement at the conclusion of the period of suspension or five years after the Discipline Order becomes final, whichever first occurs.

An Application for Reinstatement of Privileges must include a copy of the Discipline Order, proof that all conditions justifying reinstatement have been fulfilled, and proof that the applicant is in good standing before the United States District Court for the Central District of California and is a member in good standing of the State Bar of California. If the attorney's privileges were revoked, or if the suspension was for a time in excess of five years and was without any conditions precedent to reinstatement, it shall be within the sole discretion of the Chief Judge whether to issue a reinstatement order. If the Chief Judge determines that the attorney is entitled to reinstatement of practice privileges, he or she may issue a Reinstatement Order. Upon entry of the Reinstatement Order, the attorney affected thereby shall be deemed eligible to practice before all the judges of this court except to the extent any judge of this court has issued an order, other than under this rule, denying that attorney the right to appear before that judge or to appear in a particular case.

Upon entry, the clerk shall transmit a copy to all judges of this court and to the attorney, the clerk of the District Court, and to the United States Trustee. In addition, if the Discipline Order was sent to the State Bar or published, the Clerk shall transmit the Reinstatement Order to the State Bar and publish it in the same publication, if possible. If the Chief Judge does not grant the Application for Reinstatement of Privileges, he or she shall issue an order denying the application together with a separate written statement of the reasons for his or her decision. That order will become final 14 days after entry.

If an attorney's Application for Reinstatement of Privileges is denied, he or she may reapply for reinstatement after one year from the date of entry of the order denying the previous application or within such other time or upon fulfillment of such conditions as may be set forth in the order denying reinstatement.

Maintenance of Discipline Files

Except to the extent that access to a particular file is restricted or prohibited by order of the Chief Judge or the Panel to which the matter was assigned, (1) those files shall be maintained in accordance with applicable law and rules for maintenance of miscellaneous files of this court and shall be available for review and copying by members of the public, and (2) orders, opinions and written memoranda issued in these matters shall be published on the court's website.

The clerk shall close a disciplinary file 30 days after entry of a dispositive order (for example, an Order Re Revocation of Privileges or a Reinstatement Order) in that proceeding unless within that time the clerk receives a Notice of Appeal of any order rendered in the proceeding or other information justifying maintenance of the file in an open status. The clerk shall reopen a disciplinary file upon the request of the attorney, for the convenience of the court, or upon order of any judge of this court, whereupon the clerk shall advise the Chief Judge accordingly. So long as any disciplinary files remain open, the clerk shall provide the Chief Judge a quarterly status report of all such open

files to which will be attached copies of their dockets. The Chief Judge may order any such files closed when he or she deems it appropriate, consistent with the provisions hereof and the status of any such matter.

Motion to Have Opinion Removed from Website

At any time after the entry of a Reinstatement Order, the attorney may apply to the Chief Judge of this court for an order directing the Clerk to remove the Discipline Order and any related opinion and memoranda from the court's website. An application for this relief must include a copy of the Discipline Order and the Reinstatement Order. It shall be within the sole discretion of the Chief Judge whether to grant such an application.

Appeals

All orders issued pursuant to this rule shall be appealable to the extent permitted by applicable law and rules of court.

IT IS SO ORDERED.

Date: Sept. 15, 2011

Peter H. Carroll
Chief Judge, United States Bankruptcy Court