2022 Alexander L. Paskay Memorial Bankruptcy Seminar

Current Ethical Issues

PLENARY SESSION

Hon. Roberta A. Colton, Moderator
U.S. Bankruptcy Court (M.D. Fla.) | Tampa

Roberta K. Flowers
Stetson University College of Law | Gulfport, Fla.

Loretta C. O'Keeffe
Gibbons | Neuman | Tampa

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Adams and Reese LLP | Tampa

2022

46th Annual Alexander L. Paskay Memorial Bankruptcy Seminar
March 29-31, 2022 | Tampa, Florida

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Mediation Ethics: *Truth Telling & Fair Dealing*

Hon. Roberta A. Colton
U.S. Bankruptcy Court, Middle District of Florida

Mediation burst onto the bankruptcy scene in the early 1990s. At that time, courts were quick to order parties to mediation, and local rules were promptly adopted to enact procedures necessary to facilitate and to protect the confidentiality of mediations. But ethical guidance lagged and came much more slowly.

I. *Lying During a Mediation*

It was not until 2004 that professional rules of conduct regarding truthfulness were expressly extended to mediation and negotiations. And, as a result, the rules of truthfulness in a mediation context can be characterized into three groups (i) statements regarding material facts; (ii) statements regarding non-material facts, and (iii) opinions.[1]

Rule 4.1 of the American Bar Association's Model Rules of Professional Conduct ("Model Rule(s)") provides:

> ***Truthfulness in Statements to Others***
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[2]

Notably, Model Rule 4.1 only prohibits misrepresentation of material facts. The rule does not apply to misrepresentations of non-material facts or opinions exchanged during mediation.

But what if a statement is partially true but still misleading? What if the attorney incorporates or affirms the statement of another while knowing that falsity of the statement? The comments to Model Rule 4.1 make clear that in each of these cases, the described conduct is

[1] *See generally* Donald C. Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 120 (2007).
[2] MODEL RULES OF PROF'L CONDUCT r 4.1 (Am. Bar. Ass'n 2019).

prohibited.[3] Falling within this category of material facts would be statements regarding assets and ability to pay, the undisclosed death of a party, or the existence of insurance coverage.

Misrepresentations regarding non-material facts are the grey area. Some place projections, estimates of value, and prospects of litigation success into this category. Misrepresentations of non-material facts are not expressly prohibited in mediations, but they can certainly impact an attorney's reputation for honesty and integrity. And for a bankruptcy attorney, that can be fatal.

Finally, puffery or opinions are generally expected and, as a result, discounted in most negotiations. A lawyer posturing that he is the greatest litigator to ever live will be seen for what it is and hopefully ignored by all.

Of course, the reason that lying was originally rife in mediations was the scepter of confidentiality. If someone lied, it was difficult to bring it to the attention of a court. But again, slowly but surely, the law catches up with the deceitful. For example, Florida excepts from its confidentiality rules mediation communications "offered for the limited purpose of establishing or refuting legally recognized grounds [*e.g.,* fraud] for voiding or reforming a settlement agreement reached during a mediation[.]"[4] Federal mediation confidentiality likewise may not preclude a litigant from challenging the validity of a mediated settlement.[5]

The bottom line is that there is no need to lie about anything in the context of a mediation. An effective lawyer does not need to lie. Honesty and integrity are what builds the trust necessary to successfully negotiate in a mediation.

II. *Participation in "Good Faith"*

Virtually every order and every local rule dealing with mediation directs the parties to participate in "good faith." Yet virtually no order or local rule tells the parties what constitutes good faith participation in a mediation. Even a requirement of a representative with "full settlement authority" is ambiguous and subject to interpretation. Further complicating matters is

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[3] MODEL RULES OF PROF'L CONDUCT r 4.1 cmt. 1 (Am. Bar. Ass'n 2019).

[4] FLA. STAT. § 44.405(4)(a)(5) (effective July 1, 2004).

[5] *See FDIC v. White*, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999):

> The Court does not read the [Alternative Dispute Resolution Act of 1998] or its sparse legislative history as creating an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation. Indeed, such a privilege would effectively bar a party from raising well-established common law defenses such as fraud, duress, coercion, and mutual mistake. It is unlikely that Congress intended such a draconian result under the guise of preserving the integrity of the mediation process.

that what happens at a mediation is supposed to be confidential. So, how can a court be expected to police conduct at a mediation?

As suggested in the cases summarized below, courts are all over the map in terms of their expectations of "good faith" and to what extent a failure to meet those expectations is sanctionable.

Richard v. Spradlin, No. 12–127–ART, 2013 WL 1571059 (E.D. Ky. Apr. 12, 2013):

The District Court affirmed the Bankruptcy Court's imposition of sanctions following a failed mediation. The Bankruptcy Court found the defendant's behavior, particularly the filing of a state-court suit during mediation, constituted bad faith. Also, the night before the mediation, the defendant's attorney informed the mediator that the defendant and the attorney needed to meet before the mediation and would be late. Ultimately, the defendant insisted on spending several hours with his attorney before joining the meeting. Importantly, the defendant did not identify any preparatory actions he took prior to the mediation.

Otto v. Hearst Commc'ns, Inc., 17-CV-4712 (GHW) (JLC), 2019 WL 1034116 (S.D. N.Y. Feb. 21, 2019):

After a mandatory mediation to discuss damages, the defendant alleged that the plaintiff's attorney mediated in bad faith by eliciting false statements and misrepresenting documents. Declining to impose sanctions, the District Court noted (i) the Court lacked the evidentiary record necessary to find bad faith because the plaintiff's alleged misrepresentations were not recorded and (ii) the misrepresentations did not induce any settlement and were eventually corrected. Thus, the defendant suffered "relatively little prejudice."

Procaps S.A. v. Patheon Inc., No. 12–24356–CIV, 2015 WL 3539737 (S.D. Fla. June 4, 2015):

In finding that the plaintiff's conduct did not amount to bad faith, the District Court noted that only objectively determinable conduct should be considered, such as whether the party attended the meetings or brought a representative with sufficient settlement authority. Subjective concepts, such as whether a party who refuses to settle during mediation is operating in bad faith, should generally not be considered. Accordingly, the plaintiff's failure to respond to the defendant's request for a current settlement value before the mediation did not itself constitute a failure to mediate in good faith.

In re A.T. Reynolds & Sons, 452 B.R. 374 (S.D. N.Y. 2011):

The District Court reversed the Bankruptcy Court's sanction for mediating in bad faith where in a mandatory court-ordered mediation the creditor informed the debtor that it would not make a settlement offer and insisted that it was not liable. In reaching this decision, the District Court recognized that considerations of coercion and confidentiality preclude a court from inquiring into the level of a party's participation during mandatory court-ordered mediations.

Freedom Sci. BLV Grp., LLC v. Orient Semiconductor Elecs., Ltd., No. 8:13–cv–569–T–30TBM, 2014 WL 201745 (M.D. Fla. Jan. 17, 2014):

In the order referring the case to mediation, representatives were directed to have full settlement authority, as required by local rule. During the mediation, the defendant's representative informed the mediator that she would not respond to the plaintiff's offer and "could not get the authority to do so." Accordingly, the plaintiff moved for sanctions on grounds that the representative's conduct failed to satisfy the good faith requirement. In turn, the defendant sought sanctions for breach of mediation confidentiality. The court found that where the mediator is not charged with the responsibility to report bad faith conduct, plaintiff's "only recourse" was to raise and present the issue notwithstanding mediation confidentiality. Nevertheless, the court found no bad faith because the mediator's report stated that both parties had full settlement authority and did not indicate bad faith during mediation. That the defendant showed up to the mediation with a valid representative was enough to satisfy the requirement.

Ethical Issues Associated with Litigation Finance

Litigation finance in practice, while always subject to judicial scrutiny, may also be subject to applicable state laws, regulations, and, as to the attorneys involved, rules of professional conduct and legal ethics. Relevant rules may include those governing confidentiality, conflicts, business dealings with or financial assistance provided to clients, acquiring an interest in the client's cause of action, limitations on accepting a representation where fees are paid by third parties, as well as professional independence and prohibitions on fee-splitting. "While a few states have introduced legislation recently pertaining to litigation funding, most have not, and there is no federal legislation governing litigation funders or funding transactions."[1]

Issues to consider and/or which may arise:

- Rules of professional conduct and legal ethics may, and likely, apply.
- Doctrines of Champerty and Maintenance. Rules vary by jurisdiction.
- Usury, if the financing agreement may be characterized as a loan rather than a non-recourse investment.
- Discovery and Disclosure, both of the transaction and the transaction's documents as well as the communications with those providing financing. "[D]iscovery disputes relating to litigation finance typically hinge on relevance and privilege."[2]
- Fee Splitting with Nonlawyers.
- Conflicts of interest as among the funder, the attorneys, and the parties.

Bankruptcy Cases involving Litigation Funding:[3]

Dean v. Seidel, No. 3:20-CV-01834-X, 2021 WL 1541550, at *1 (N.D. Tex. Apr. 20, 2021) (used to pay legal fees of a chapter 7 trustee pursuing claims against third parties).

[1] Ken Epstein, Amy Geise, & Connor Williams, *Ligation Finance in Bankruptcy: A Potential Game-Changer*, p.3, N.C.B.J. Presentation (Oct. 7, 2021), *materials available at* https://ncbjmeeting.org/2021/written-materials/ (last visited March 7, 2022).
[2] *Id.* at 6 (citation omitted).
[3] *Id.* at 13–15.

In re Cyber Litig. Inc., No. 20-12702 (CTG), Doc. No. 165 (Bankr. D. Del. Dec. 15, 2020)[4] (used to provide DIP financing to facilitate an asset sale, investigation, and prosecution of claims against former executives, and development of a litigation and asset recovery plan).

In re Welded Constr., L.P., No. 18-12378 (CSS), Doc. No. 745 (Bankr. D. Del. May 22, 2019)[5] (used to provide DIP financing to pay legal fees and expenses in an adversary proceeding).

Paragon Litig. Tr. v. Noble Corp. PLC (In re Paragon Offshore PLC), No. 16-10386 (CSS), Adv. No. 17-51882 (CSS), Doc. No. 215 (Bankr. D. Del. July 12, 2019) (used to provide a litigation trust $40 million for litigation costs and expenses).[6]

Valley Nat'l Bank v. Warren, 535 F. Supp. 3d 1235 (M.D. Fla. 2021), *dismissing, for lack of standing, appeal from In re Westport Holdings Tampa, LP*, No. 16-bk-08167-MGW, Doc. No. 1827 (Bankr. M.D. Fla. July 17, 2020) (used to pay a liquidating trustee's fees and expenses in an adversary proceeding). [Judge Williamson's decision is included in these materials.]

In re Cortlandt Liquidating LLC, No. 20-12097-scc, Doc. No. 392 (Bankr. S.D. N.Y Dec. 28, 2020)[7] (used to monetize the debtors' interest in insurance coverage litigation through a 363 sale).

Davidson Kempner Capital Mgmt. L.P. v. Official Committee of Unsecured Creditors (In re Motors Liquidation Co.), No. 16 Civ. 6927 (PKC), 2017 WL 3491970, 2017 U.S. Dist. LEXIS 128943 (S.D. N.Y. Aug. 14, 2017) (used to provide a litigation cost advance to a litigation trust pursuing avoidance actions against former lenders).

In re Magnesium Corp. of America, No. 01-14312-lbg, Doc. No. 745 (Bankr. S.D. N.Y. Aug. 24, 2016)[8] (used to monetize a partial interest in a substantial estate judgment through a 363 sale).

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[4] Cyber Litigation Inc. was formally known as NS8 Inc. The bankruptcy court approved the changing of the Debtor's name in the case caption shortly after the order approving the financing was entered. *In re Cyber Litigation Inc.*, Case No. 20-12702 (CTG), Doc. No. 201 (Bankr. D. Del. Jan. 14, 2021). And shortly after that, the case was reassigned to Judge Craig T. Goldblatt. *Id.*, Doc. No. 349 (Apr. 26, 2021).

[5] The case was reassigned to Judge Christopher S. Sontchi on Jan. 23, 2020. *In re Welded Constr., L.P, et al.*, Case No. 18-12378 (CSS), Doc. No. 1195 (Bankr. D. Del. Jan. 23, 2020).

[6] The motion to approve the litigation financing and the declaration in support thereof appear at Doc. Nos. 199 & 200. These documents also were filed in the bankruptcy case; however, the order was entered only in the adversary.

[7] The court ordered a change in the caption of this case on Apr. 26, 2021; prior to that date, the debtor was identified as Century 21 Dep't Stores LLC. *In re Cortlandt Liquidating LLC*, No. 20-12097-scc, Doc. No. 886 (Bankr. S.D. N.Y Apr. 26, 2021).

[8] At the time the decision was rendered, Judge Mary Kay Vyskocil presided over the case. This case, now reclosed, is assigned to Judge Lisa G. Beckerman. *In re Magnesium Corp. of America*, No. 01-14312-lbg, Doc. Nos. 1198 & 1224 (Bankr. S.D. N.Y. Dec. 23, 2019, and May 26, 2021, respectively).

ORDERED.

Dated: July 17, 2020

Michael G. Williamson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:	Chapter 11
WESTPORT HOLDINGS TAMPA, LIMITED PARTNERSHIP,	Case No. 8:16-bk-8167-MGW
WESTPORT HOLDINGS TAMPA II, LIMITED PARTNERSHIP,	Case No. 8:16-bk-8168-MGW
Debtors. /	*Jointly Administered under* Case No. 8:16-bk-8167-MGW

FINAL ORDER GRANTING LIQUIDATING TRUSTEE'S EXPEDITED MOTION FOR AUTHORITY TO ENTER INTO LITIGATION FUNDING AGREEMENT WITH A/Z PROPERTY PARTNERS LLC

THIS MATTER came before the Court for hearing on July 15, 2020 at 10:00 a.m. (the "**Hearing**") upon the Expedited Motion for Authority to Enter Into Litigation Funding Agreement With A/Z Funding Property Partners LLC (the "**Motion**")[1] (Doc. No. 1822, which amends Doc. No. 1798) filed by Jeffrey W. Warren, as the Liquidating Trustee (the "**Liquidating Trustee**") for Westport Holdings Tampa, Limited Partnership ("**WHT I**") and Westport Holdings Tampa II, Limited Partnership ("**WHT**

[1] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the Motion.

II," and together with WHT I, the "**Debtors**"). In connection with the Motion, the Court has considered the Liquidating Trustee's declaration filed in support of the Motion (Doc. No. 1823) (the "**Declaration**").

In the Motion, the Liquidating Trustee seeks entry of this order (the "**Approval Order**") pursuant to 11 U.S.C. §§ 364(c)(1), 364(c)(2) and 364(d)(1) and Rules 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure granting the Motion and approving the Litigation Funding Agreement in all respects, and granting A/Z Property Partners LLC ("**AZP**") a first-priority lien on the Causes of Actions and the proceeds therefrom.

On June 29, 2020, Valley National Bank ("**Valley**") filed a preliminary objection (Doc. No. 1801) to the Liquidating Trustee's Expedited Motion to Approve Sale of Causes of Action Against Valley National Bank to BRP Senior Housing Management, LLC (the "**Sale Motion**") (Doc. No. 1798), which Sale Motion was amended by the instant Motion, and Valley raised additional objections to the Motion at the Hearing (collectively, the "**Valley Objection**"). Additionally, at the Hearing, the Jennis Law Firm objected to the Motion (the "**Jennis Objection**").

At the Hearing, the Court heard the proffers of the Liquidating Trustee and argument on the Motion, the Valley Objection, and the Jennis Objection. Upon consideration of the Motion, the Declaration, the Valley Objection, the Jennis Objection, and the arguments and proffers at the Hearing, together with the record, and otherwise being fully advised in the premises, the Court finds that (a) the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest, (b) the Valley Objection and the Jennis Objection should be

overruled as set forth herein, and (d) this Approval Order should be entered granting the Motion, approving the Litigation Funding Agreement, and directing the Liquidating Trustee to take all necessary and appropriate steps to consummate the terms of the Litigation Funding Agreement.

Accordingly, the Court makes the following findings of fact and conclusions of law supporting the relief granted herein:

A. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. The Court also has *in rem* jurisdiction. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

B. Section 364(c)(1), 364(c)(2) and 364(d)(1) of the Bankruptcy Code and Rules 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure authorize the Court to approve the Litigation Funding Agreement.

C. The Liquidating Trustee is now prepared to consummate the transactions contemplated in the APA, the Final Sale Order, the Confirmed Second Amended Plan, and the Tampa Life Consent Order; however, the Liquidating Trustee does not have sufficient cash in order to consummate the Closing on the Sale on July 17, 2020 absent approval of the Motion and receipt of the Option Payment (as defined in the Litigation Funding Agreement) at the Closing. The Court has considered the Motion to provide the necessary additional funding to allow the Closing on the Tampa Life Sale to occur prior to the July 19, 2020 deadlines under the Debtors' Consent Order and the Tampa Life Consent Order and, absent the Closing occurring prior to such deadlines, the

Debtors will face irreparable and immediate harm if the OIR terminates either of the Consent Orders.

D. Notice of the Motion, the Hearing, and the form of the Litigation Funding Agreement has been provided to the U.S. Trustee, SouthPoint and its counsel, CPIF and its counsel, and all other known holders of potential liens and security interests against the Collateral (as defined in the Litigation Funding Agreement). Under these urgent circumstances, requisite service of the Motion and notice of the relief requested thereby has been given in accordance with (i) Bankruptcy Rules 4001 and 9014(b), which service is sufficient for all purposes under the Bankruptcy Code, including, without limitation, Sections 102(1), 363 and 364 of the Bankruptcy Code, and (ii) the Bankruptcy Rules and the Local Bankruptcy Rules, and no other service need be made for the entry of this Approval Order. The hearing on the Motion constitutes a final hearing within the meaning of Bankruptcy Rule 4001(c)(2).

E. Despite sufficient and good faith efforts, the Liquidating Trustee has been unable to obtain (a) unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense, (b) credit for money borrowed secured solely by a lien on property that is not otherwise subject to a lien, (c) credit for money borrowed secured by a junior lien on property which is subject to a lien, or (d) credit otherwise on more favorable terms and conditions than those provided in the Litigation Funding Agreement. The Debtors are unable to obtain the financing without granting to AZP all of the protections provided in this Approval Order.

F. AZP and the Liquidating Trustee have negotiated the terms of the Litigation Funding Agreement in good faith and at arm's-length and AZP has not

dictated the terms of the Litigation Funding Agreement or the Motion to the Liquidating Trustee. The Option Payment and the funding to be advanced under the Litigation Funding Agreement will be advanced in good faith, and for valid business purposes and uses.

Accordingly, it is **ORDERED**:

1. The Motion is **GRANTED** on a final basis.

2. The Valley Objection is **OVERRULED**.

3. The Jennis Objection is **OVERRULED**, subject to the provisions below.

4. The Litigation Funding Agreement, which is incorporated into this Order as if fully set forth herein, and all of the terms and conditions thereof, are hereby **APPROVED**.

5. The Liquidating Trustee is authorized and directed to enter into the Litigation Funding Agreement. The Liquidating Trustee has the full power and authority to deliver all other documents contemplated in the Litigation Funding Agreement to consummate the transactions contemplated therein, without further order of the Court. The Litigation Funding Agreement is neither champertous nor usurious and is enforceable according to its terms.

6. AZP shall pay the Option Payment to the Liquidating Trustee in Cash at the Closing. The Liquidating Trustee shall use the Option Payment solely for the purpose of making payments that are required to be made at the Closing.

7. Effective upon the payment of the Option Payment, to secure the obligations to AZP of the Debtors and the Liquidating Trustee under the Litigation Funding Agreement now existing or hereinafter arising, AZP shall be and is hereby

granted liens and security interests in the Collateral, which liens and security interests shall immediately be valid, binding, permanent, continuing, enforceable, perfected and non-avoidable liens and security interests on the Collateral and the proceeds therefrom (collectively, the "**Post-Confirmation Liens**"). The Post-Confirmation Liens shall, pursuant to section 364(d)(1) of the Bankruptcy Code, be first priority priming liens and security interests on the Collateral and any proceeds therefrom, ranking prior to all other liens (including without limitation the asserted lien of The Jennis Law Firm), security interest, claims and encumbrances on the Collateral and the proceeds therefrom and shall prime other liens (including without limitation the asserted lien of The Jennis Law Firm), security interest, claims and encumbrances on the Collateral and the proceeds therefrom. This Approval Order makes no determination with respect to the validity or extent of any lien or other interest of The Jennis Law Firm in or to the Collateral or any proceeds therefrom other than ruling that any such lien or interest shall hereby be subordinate to the Post-Confirmation Liens.

8. Neither the Collateral nor the proceeds therefrom shall be subject to surcharge pursuant to section 506(c) of the Bankruptcy Code.

9. This Approval Order shall be sufficient and conclusive evidence of the validity, perfection and priority of the Post-Confirmation Liens, without the necessity of filing or recording any financing statements or other instruments or documents which may otherwise be required under the law of any jurisdiction or the taking of any other action (including, for the avoidance of doubt, entering into any deposit account control agreement) to validate or perfect the Post-Confirmation Liens, or to entitle the Post-Confirmation Liens to the priorities granted herein. Notwithstanding and without

limiting the foregoing, AZP may file such financing statements, notices of liens and other similar documents as it deems appropriate, and it is hereby granted relief from the automatic stay of section 362 of the Bankruptcy Code in order to do so, and all such financing statements, notices and other documents shall be deemed to have been filed or recorded at the time and on the date of the Closing. Upon request, the Liquidating Trustee shall take all reasonable acts to ensure that AZP's security interest and liens attach to and are perfected in the Collateral and have first priority. Without limiting the foregoing, the Liquidating Trustee shall execute and deliver to AZP all such financing statements and other documents as it may request to evidence, confirm, validate or perfect, or to insure the contemplated priority of, the Post-Confirmation Liens granted herein.

10. The Litigation Funding Agreement shall constitute and evidence valid and binding obligations of the Debtors and the Liquidation Trustee, which obligations shall be enforceable against the Debtors and the Liquidation Trustee and any successors thereto, including any successor bankruptcy trustee, and the Debtors' creditors or representatives thereof, in accordance with the terms of the Litigation Funding Agreement.

11. AZP has acted and is acting in good faith with respect to the negotiation of the Litigation Funding Agreement, and the Option Payment and litigation funding extended by AZP pursuant to the terms of the Litigation Funding Agreement will be extended in good faith. AZP's claims, security interests, liens and other protections granted pursuant to this Approval Order and the Litigation Funding Agreement will

not be affected or avoided by any subsequent reversal or modification of this Approval Order, as provided in section 364(e) of the Bankruptcy Code.

12. The proposed privilege procedures set forth in the Litigation Funding Agreement are hereby approved, and—if followed—such procedures shall protect the applicable privileges as set forth in such agreement.

13. From and after the Closing, the Liquidating Trustee has the standing, right, and authority to prosecute the Claims (as defined in the Litigation Funding Agreement), and nothing in this Approval Order, the Litigation Funding Agreement, or otherwise shall prejudice such standing, right, or authority.

14. The terms of this Approval Order are mutually dependent and non-severable. This Approval Order shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and shall take effect and be fully enforceable immediately upon entry of this Approval Order. Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062, 9024, or any other Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Approval Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Approval Order.

15. This Approval Order and the relief granted is without prejudice to and does not amend or alter this Court's Order Overruling Jennis Firm's Objecting to Liquidating Trustee's Notice of Filing Pro Forma Closing Statement (Doc. No. 1810).

Attorney Adam Lawton Alpert is directed to serve a copy of this order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of this order.

FLORIDA BAR ETHICS OPINION
OPINION 00-3
March 15, 2002

Advisory ethics opinions are not binding.

An attorney may provide a client with information about companies that offer non-recourse advance funding and other financial assistance in exchange for an interest in the proceeds of the client's case if it is in the client's interests. The attorney may provide factual information about the case to the funding company with the informed consent of the client. Although the attorney may honor the client's valid written assignment of a portion of the recovery to the funding company, the attorney may not issue a letter of protection to the funding company.

Note: This opinion was approved by The Florida Bar Board of Governors on March 15, 2002.

RPC: 4-1.6, 4-1.7, 4-1.8(e)
OPINIONS: 65-39, 68-15, 70-8, 75-24, 92-6, Arizona Ethics Opinion 91-22, New York State Bar Opinion 666, Philadelphia Bar Association Opinion 91-9, South Carolina Ethics Opinion 94-04, South Carolina Ethics Opinion 92-06, South Carolina Ethics Opinion 91-15, Ohio Ethics Opinion 94-11, Virginia Ethics Opinion 115
CASES: *The Florida Bar re Amendments to Rules Regulating The Florida Bar Rule -- 4-1.8(e)*, 635 So.2d 968 (Fla. 1994)

The Committee has recently received numerous inquiries regarding various proposals to assist personal injury clients in obtaining non-recourse advance funding for the clients' personal expenses unrelated to the costs and attorneys' fees in the litigation pending recovery in their cases. The inquiring attorneys have received communications from funding companies offering to provide funds to personal injury clients in exchange for an assignment of part of the proceeds of the clients' cases. The attorneys specifically would like to know if they are permitted to provide the clients with information about the funding companies, provide information about the clients' cases to the funding companies, and provide the funding companies with letters of protection.

Whether a particular arrangement between the client and a funding company complies with applicable statutes is a legal question, outside the scope of an ethics opinion. The Committee therefore makes no comment on the legality of these transactions. *See, e.g., Kraft v. Mason*, 668 So.2d 679 (Fla. 1996). *But see, Rancman v. Interim Settlement Funding Corp.*, 2001 WL 1339487 (Ohio 2001). If the transactions are illegal, an attorney must not participate in the transaction in any way. If a client requests information about or assistance with obtaining the funding, the attorney should advise the client about the illegal nature of the transaction and must not participate in or assist the client with the transaction. Rule 4-1.2(d).

This opinion discusses appropriate conduct of attorneys regarding advance funding companies assuming that the transactions offered by the companies are legal. Nothing in the

opinion should be viewed as endorsing advance funding companies or the use of advance funding companies in any way by The Florida Bar.

This Committee has previously indicated that attorneys cannot personally loan money to clients in connection with pending litigation. Florida Ethics Opinion 65-39. The Committee has also advised that an attorney may not indirectly loan funds to clients in connection with pending litigation through a nonprofit corporation funded by attorney contributions. Florida Ethics Opinion 68-15.

Regarding loans from third parties to personal injury clients, this Committee has previously stated that "a lawyer may suggest to a client where the client may try to obtain financial help for individual needs. . ., but the lawyer should not become part of the loan process." Florida Ethics Opinion 75-24. The Committee stated that "[w]here the lawyer initiates the loan by recommending his client to the loan company, it seems to us that he is inherently representing to the loan company that the client's claim is meritorious." *Id*. The Committee cited to this opinion in Florida Ethics Opinion 92-6, which states that it is impermissible for an attorney to become involved in a financing agreement which required the attorney to become a trustee to benefit the company providing the loan to the attorney's client. The Committee additionally noted that "an attorney who routinely refers clients to a loan company and actively participates in the loan transactions would be providing financial assistance to those clients," albeit indirectly. Florida Ethics Opinion 92-6. When presented with the proposal at issue in opinion 92-6 in the form of a petition for a rule change, the Supreme Court of Florida stated that:

> The Bar argues that the proposed amendment will result in inevitable conflicts of interest among lawyer, client, and lending institution, as well as discouraging settlements. We agree. . . . . We find that the rule amendment LRM proposes would violate both subsections of rule 4-1.8, thus creating possible conflicts of interest. This Court has disciplined members of the Bar for advancing funds or assisting others to do so. *The Fla. Bar v. Hastings*, 523 So. 2d 571 (Fla. 1988); *The Fla. Bar v. Wooten*, 452 So 2d 547 (Fla. 1984); *The Fla. Bar v. Dawson*, 318 So. 2d 385 (Fla.), cert. denied, 423 U.S. 995, 96 S. Ct. 422, 46 L. Ed. 369 (1975). Lawyers should not be encouraged or allowed to do indirectly what they cannot do directly. The majority of states likewise prohibit this conduct. We therefore reject LRM's proposed rule amendment.

The Florida Bar re Amendments to Rules Regulating The Florida Bar -- Rule 4-1.8(e), 635 So.2d 968 (Fla. 1994). The Committee has not addressed whether an attorney could honor a letter of protection to a funding company, and has not elaborated on our advice in Opinion 75-24 as to the extent to which an attorney may "try to obtain financial help" for clients without becoming involved in the process of obtaining financial assistance. The Committee now undertakes to answer these questions.

The majority of states who have examined these issues have determined that it is permissible for an attorney to provide a client with information about funding companies. See, e.g., Arizona Ethics Opinion 91-22 (attorney may refer personal injury client to funding company, but may not reveal information to the company without the client's consent, may not co-sign or guarantee the transaction, and may not tell the company that the lien is valid and

enforceable if in the attorney's opinion it is not); New York State Bar Association Opinion 666 (attorney may refer client to funding company which then takes a lien on the recovery, may provide information to the company only with informed consent of the client, but may not have an ownership interest in the company or receive any compensation from the company for the referral); Philadelphia Bar Association Opinion 91-9 (attorney may refer personal injury client to funding company which takes a lien on the recovery, but may not have an ownership interest in the company or receive any compensation from the company, must maintain independent professional judgment, and must have informed client consent to disclose information to the company); South Carolina Ethics Opinion 94-04 (if the transaction is not illegal, an attorney may tell a personal injury client about funding companies at the client's request or if it is in the client's interest, but should advise the client of the benefits and detriments of the transaction, should inform the client and company in writing that the client controls the litigation; the attorney may also pay the settlement proceeds to the company under a valid assignment); South Carolina Ethics Opinion 92-06 (an attorney may refer personal injury clients to a funding company and may honor the assignment of a portion of the claim to the company); South Carolina Ethics Opinion 91-15 (attorney may refer personal injury clients to a funding company in which the attorney has no interest, and may honor the assignment to the company as long as the client consents); Ohio Ethics Opinion 94-11 (attorney may not refer a client to a funding company which requires the attorney to give a percentage of the legal fee to the company, but may refer a client to a funding company if such an arrangement is not required, it is in the client's best interest, and the arrangement does not cause the attorney to violate the rules of professional conduct; the attorney should advise the client on alternative methods of obtaining assistance such as low interest credit cards, bank loans or personal loans from the client's family or friends); Virginia Ethics Opinion 115 (an attorney may request that a funding company provide a personal injury client with funding when other lending sources have declined to assist the client and may honor the company's lien on the recovery, but the attorney may not guarantee or co-sign the loan). The majority of states have concluded that providing information to a funding company at the client's request is permissible, with the informed consent of the client. They also conclude that an attorney may honor a client's assignment of a portion of the recovery to the funding company.

The Florida Bar discourages the use of non-recourse advance funding companies. The terms of the funding agreements offered to clients may not serve the client's best interests in many instances. The Committee continues to have concerns, as discussed in Opinion 92-6, of the problems that can arise when a client obtains financial assistance from a third party, such as the client's lack of incentive to cooperate. This Committee can conceive of only limited circumstances under which it would be in a client's best interests for an attorney to provide clients with information about funding companies that offer non-recourse advance funding or other financial assistance to clients in exchange for an assignment of an interest in the case. Under these limited circumstances an attorney may advise a client that such companies exist only if the attorney also discusses with the client whether the costs of the transaction outweigh the benefits of receiving the funds immediately and the other potential problems that can arise. Only after this discussion may a lawyer provide the names of advance funding companies to clients.

The attorney shall not recommend the client's matter to the funding company nor initiate contact with the funding company on a client's behalf. Florida Ethics Opinion 75-24. The attorney shall not co-sign or otherwise guarantee the financial transaction. Florida Ethics

Opinion 70-8. The attorney also shall not allow the funding company to direct the litigation, interfere with the attorney-client relationship, or otherwise influence the attorney's independent professional judgment. The attorney shall not have any ownership interest in the funding company or receive any compensation or other value from the funding company in exchange for referring clients.

The attorney may provide information to a funding company about the case at the client's request. Before providing the company with such information, the attorney must advise the client about the effects of the disclosure, including whether any privileges such as attorney-client and work product may be waived if the information is disclosed to the funding company, and obtain the client's informed consent. Rule 4-1.6. If the client, after consultation, requests that the attorney provide the funding company with confidential information, the attorney is not obligated to provide work product material, such as the attorney's personal notes. However, the attorney may provide copies of documents such as medical records and accident reports if the client requests. The attorney is not obligated to bear the costs of copying the documents. Additionally, the attorney shall not provide the funding company with an opinion regarding the worth of the client's claim or the likelihood of success. Rule 4-1.7, Florida Ethics Opinion 75-24.

Finally, the attorney may, at the client's request, honor a client's valid, written assignment of a portion of the recovery to the funding company. The attorney may not, however, provide a letter of protection to the funding company signed by the attorney.

In conclusion, an attorney may, under the circumstances set forth above, provide a client with information about companies that offer non-recourse advance funding and other financial assistance in exchange for an interest in the proceeds of the client's case. The attorney may provide factual information about the case to the funding company with the informed consent of the client. Although the attorney may honor the client's valid written assignment of a portion of the recovery to the funding company, the attorney may not issue a letter of protection to the funding company.

FLORIDA BAR ETHICS OPINION
OPINION 96-1
October 1, 1996

Advisory ethics opinions are not binding.

An attorney may not unconditionally agree to be responsible for the costs associated with a client's litigation. While Rule 4-1.8(e) permits an attorney to advance costs and expenses of litigation on behalf of a non-indigent client, the rule contemplates repayment of such costs in the event of a recovery.

RPC: 4-1.8(e)
Opinions: 72-27; Iowa Opinion 93-2, Mississippi Opinion 225; North Carolina Opinion 124

A member of The Florida Bar has requested an advisory ethics opinion on the propriety of submitting a contract for representation proposal to a State agency in which the attorney agrees to be responsible for the costs, even if a recovery is obtained. Specifically, the contract provides, in pertinent part:

> Payment for services covered by the resulting contracts will be based on a contingency fee percentage of the total dollars recovered and reimbursed to the Agency. Provider shall not separately bill costs, but shall absorb and pay all costs whatsoever. . . . and
>
> All costs incurred by the contractors in performance under the contracts will be the responsibility of the contractors. No additional payments will be made to the contractors to reimburse them for travel expense, filing fees, court cost, or any other cost. . . .
>
> The contracts resulting from this RFP will be based on a contingency fee for actual cash recoveries received by the state. The maximum acceptable contingency fee is 25%. Any proposals with a contingency fee greater than 25% will be determined nonresponsive by the Agency and will be rejected. All costs incurred by the contractor(s) in performance under the contract(s) will be the responsibility of the contractor(s)[.]

Rule 4-1.8(e), Rules Regulating The Florida Bar, is the governing ethical standard:

> **(e) Financial Assistance to a Client.** A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

This rule prohibits an attorney from providing financial assistance to a client in connection with pending or contemplated litigation. The rule, however, contains an exception permitting the attorney to *advance* court costs and expenses of litigation on behalf of a non-indigent client, the repayment of which may be contingent on the outcome of the matter. See, e.g., Florida Ethics Opinion 72-27; Iowa Opinion 93-2; Mississippi Opinion 225; North Carolina Opinion 124. Although this exception permits attorney and client to agree that the client's repayment of advanced costs and expenses will be contingent on the outcome of the matter, it clearly contemplates that such repayment will be made if a sufficient recovery is obtained. In contrast, the inquiring attorney proposes an outright payment of costs for a non-indigent client, rather than an advancement.

The concerns raised by Rule 4-1.8(e) are that of the common law doctrines of champerty and maintenance, as well as the conflict of interest created when an attorney has a personal economic interest in the outcome of the matter. The committee recognizes that the concerns underlying the rule may be minimized when the client is a state agency, but is constrained to apply the rule as it is written. Accordingly, the committee concludes that, under the plain language of Rule 4-1.8(e), it would be ethically impermissible for the inquiring attorney to unconditionally be responsible for all costs and expenses as provided in the proposed agreement.

FLORIDA BAR ETHICS OPINION
OPINION 16-2
October 21, 2016

Advisory ethics opinions are not binding.

A lawyer may provide clients with information about a financing company in which the lawyer has no ownership or other interest, which will loan the lawyer's clients' money to pay the lawyer's fees for criminal defense representation in which the financing amounts, charge and interest vary, in which the financing charge is a varying percentage of the loan, if the lawyer offers clients all available fee options including payment plans and credit cards, does not charge participating clients any higher fee, does not recoup the finance charge from the client, will continue the representation regardless of whether the client repays the loan to the financing company, and receives no benefit from the financing company for any client's participation other than the lawyer's fees for representation for which the client will repay the finance company.

Note: Rule Regulating The Florida Bar 4-1.5(h) was amended in 2019 to permit a lawyer to charge a client the actual charge a credit plan imposes on the lawyer for the client's transaction. ***In re: Amendments to the Rules Regulating The Florida Bar - Biennial Petition*****, (Fla. Jan. 4, 2019), Case No. SC18-1683.**

RPC: 4-1.5(h), 4-1.6, 4-1.7(a)(2), 5-1.1(a)(1)
Opinions: 93-2

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring lawyer's letter and subsequent response to the committee's questions are as follows.

The inquirer has been approached by a finance company that offers to provide loans to the inquirer's clients to pay for legal fees for representation in criminal defense cases. The inquirer has no ownership interest in the finance company and no existing relationship with the finance company. The inquirer would offer criminal defense clients all available options to pay for representation in addition to the finance company, including payment plans and credit cards. If the client opts to pay the inquirer's fees through the finance company, the client would apply on-line through the finance company. Loan amounts range from $1,000 to $10,000, repayment of the loan ranges up to 5 years, and the financing company charges a financing fee and interest rate that vary depending on the client's credit score. The finance company alone determines the loan amount, financing fee, repayment plan, and interest rate. The financing fee is between 5% and 15% of the loan amount. If the loan is approved, the inquirer's account is credited with the full amount of the loan, less the financing fee. On approval, the inquirer's client has 6 months to repay the full amount of the loan with no interest or penalty. After 6 months, the client must make monthly payments and repay the full amount of the loan and interest directly to the finance company. The finance company assesses no penalty for early repayment. The inquirer receives nothing from the finance company for any client's participation in the finance company. The inquirer's fee agreement with individual clients would explain the inquirer's fees, the financing fees, and the loan process. The inquirer states that the inquirer will continue representation of

the client regardless of whether the client defaults on the loan, as the inquirer's fees will have been paid in full at the outset of representation.

The inquirer asks whether the company's retention of a percentage of the loan amount as a financing fee constitutes improper division of fees with a nonlawyer, or whether any other aspect of the arrangement is improper.

The committee is of the opinion that the loan arrangement is not an impermissible division of fees and that the inquirer may provide clients with information about the finance company under the circumstances described above, and with the caveats below.

Rule 4-1.5(h) is applicable and provides as follows:

> **(h) Credit Plans.** A lawyer or law firm may accept payment under a credit plan. No higher fee shall be charged and no additional charge shall be imposed by reason of a lawyer's or law firm's participation in a credit plan.

Credit plans, including major credit cards, typically charge a percentage of a charge to the vendor in addition to interest to the debtor. Rule 4-1.5(h) specifically permits credit plans, including credit cards, despite the fact that most deduct a percentage of the charge from the amount paid to the vendor, in addition to charging interest to credit card holders. Additionally, the risks associated with sharing legal fees with a nonlawyer are not present in this situation as long as the finance company does not direct or influence the lawyer's independent legal judgment in the representation or adversely impact the lawyer-client relationship, and the inquirer does not disclose confidential information to the finance company in violation of Rule 4-1.6. The inquirer should only refer clients to the finance company where the referral is in the best interests of those clients. See Rule 4-1.7(a)(2). Additionally, the inquirer should explain the inquirer's role in the financing transaction and may recommend that the client obtain independent legal advice in the financing transaction or obtain information directly from the financing company.

If the inquirer charges a flat nonrefundable fee and no portion of the funds deposited with the lawyer from the financing company constitute advances on either fees or costs, then the funds must be deposited into the inquirer's operating account, as the funds are considered earned on receipt and therefore the property of the inquirer, which must not be commingled with client property. *See,* Florida Ethics Opinion 93-2 and Rule 5-1.1(a)(1).

In summary, the committee's opinion is that the inquirer may provide clients with information about the financing company under the circumstances set forth above if the inquirer does not charge participating clients any higher fee, does not recoup the finance charge from the client, and receives no benefit from the financing company for any client's participation other than the inquirer's fees for representation for which the client will repay the finance company. Finally, in order for the inquirer to provide clients with information about the financing company, the terms of the loan must comply with applicable law, which is outside the scope of an ethics opinion.

FLORIDA BAR ETHICS OPINION
OPINION 96-3
February 15, 1997

Advisory ethics opinions are not binding.

An attorney may not ethically agree to pay fees and costs assessed to a client pursuant to the Offer of Judgment statute.

RPC: Rule 4-8.4(d), Rule 4-1.8(e)
Cases: *The Florida Bar re: Amendment to Rules*, 550 So. 2d 442 (Fla. 1989), *Goode v. Udhwani*, 648 So.2d 247 (Fla. 4th DCA 1995)
Opinions: New York City Bar Formal Opinion 1989-3
Misc: Florida Statute 768.79, Florida Rule of Civil Procedure 1.442

A member of the Florida Bar requests an advisory ethics opinion regarding the lawyer's ability to agree to pay costs and fees assessed against the lawyer's client in accordance with section 768.79, Florida Statutes. Specifically, the inquiring attorney has asked the following question:

> Whether or not I, as attorney for plaintiff, may enter into an agreement with my client that if we go to trial and if we are unsuccessful and become subject to sanctions of attorney's fees and costs pursuant to the first defendant's Offer of Judgment, may I, as the attorney, agree to pay my clients' attorney's fees and costs to the defendant's insurer if we lose?

Pursuant to section 768.79 of the Florida Statutes (hereinafter, the "statute"), a plaintiff who refuses an offer of settlement made by the defendant must pay reasonable costs, including attorney's fees, incurred by the defendant from the date of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than the offer. Under the statute, the assessment of costs and fees against a client will occur, if at all, only at the conclusion of the litigation. The statute provides that a court must either set off such costs and fees against any award obtained by the client, or, if the client obtains an award less than the amount of the costs and fees, the court will enter a judgment against the plaintiff for the amount of costs and fees not covered by the plaintiff's award.

Referring to Florida Rule of Civil Procedure 1.442, which requires parties to comply with the procedures set forth in section 768.79, the Supreme Court of Florida has described the procedure governing offers of judgment as one "by which parties are sanctioned for failure to accept bona fide offers of settlement prior to trial." *The Florida Bar re: Amendment to Rules*, 550 So. 2d 442 (Fla. 1989). Additionally, in *Goode v. Udhwani*, 648 So. 2d 247 (Fla. 4th DCA 1995), the court stated that, "The purpose of section 768.79 was to serve as a penalty if parties did not act reasonably and in good faith in settling lawsuits."

The committee concludes that the proposed conduct would be prejudicial to the administration of justice, in violation of Rule 4-8.4(d), because it would defeat the purpose of the Offer of Judgment statute. In Opinion 1989-3, the New York State Bar Association Committee

on Professional Ethics found that an agreement requiring a client to pay Rule 11 sanctions imposed upon a lawyer for filing non-meritorious claims was unethical because it defeated the purpose of the Rule and improperly shifted liability to the client. [Editor's note: the correct citation is New York City Bar Formal Opinion 1989-3]. Similarly, the deterrent effect of the Offer of Judgment statute would be defeated if lawyers could insulate their clients from potential financial liability.

Furthermore, costs and fees assessed pursuant to this statute are not the type of "financial assistance" contemplated by Rule 4-1.8(e).

Based upon the foregoing, the committee concludes that the proposed conduct is ethically impermissible.

FLORIDA BAR ETHICS OPINION
OPINION 16-1
October 21, 2016

Advisory ethics opinions are not binding.

A personal injury lawyer may "forgive" repayment of advanced costs from a client's recovery where there has been no agreement for the inquirer to be unconditionally responsible for the costs at the outset of representation, the cost "forgiveness" occurs after settlement, and the inquirer will receive no fees for the representation. The lawyer must be mindful of third party interests in the settlement funds and the lawyer's obligation of candor to third parties.

RPC: 4-1.8(e), 4-4.1, 4-8.4(c), 5-1.1(f)
Opinions: 96-1; Michigan Ethics Opinion RI-14

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring lawyer's letter are as follows.

The inquirer represents a client in a negligence case. Subsequent to stating a cause of action, an appellate decision changed the law, which eliminated the cause of action. The parties then reached a settlement. The total of the client's outstanding medical bills and costs are nearly double the amount of the settlement. The inquirer advanced the litigation costs on behalf of the client, to be repaid by the client contingent on the outcome of the matter. The settlement exceeds the amount of costs advanced by the inquirer by a small amount. The inquirer, who is not taking a fee, would like to reduce the amount of costs owed to the inquirer by the client so that the client may receive some of the settlement after resolving outstanding medical liens and subrogated interests.

The inquirer asks whether the inquirer may reduce the amount of the costs that the client owes the inquirer in light of Florida Ethics Opinion 96-1, which states that a lawyer cannot agree to be unconditionally responsible to pay for a client's litigation costs.

Rule 4-1.8(e), Rules Regulating the Florida Bar, is the rule regarding financial assistance to clients. The rule states:

> **(e) Financial Assistance to Client.** A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Rule 4-1.8 (e)(1) permits a lawyer to advance court costs and expenses of litigation provided the client repays the advances if there is a recovery. The exception under Rule 4-1.8

(e)(2) permits a lawyer to pay an indigent client's court costs and litigation expenses without any reimbursement requirement. As the facts indicate, the inquirer's client is not indigent.

The comment to the rule elaborates and explains the reasons for the prohibition against financial assistance:

> **Financial assistance**
>
> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer advancing a client court costs and litigation expenses, including the expenses of diagnostic medical examination used for litigation purposes and the reasonable costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Michigan Ethics Opinion RI-14 (1989) provides additional background regarding the origin of the prohibition against financial assistance:

> MRPC 1.8 (e) is the result of the common law rules against champerty and maintenance. Champerty is an investment in the cause of action of another by purchasing a percentage of any recovery. Maintenance is another form of investment by providing living or other expenses to finance litigation. When a lawyer has a financial stake in the outcome of a client's lawsuit, there is a legitimate concern that the lawyer's undivided loyalty to the client may be compromised in an effort to protect the lawyer's personal financial investment in the outcome. Also financial support to a client could interfere with settlement efforts, by enabling the client to prolong the dispute.

Florida Ethics Opinion 96-1 addresses the issue of financial assistance to clients. The opinion considered a factual situation where a lawyer agreed to be responsible for costs in representing a state agency, regardless of whether there was a recovery. The Committee cited to Rule 4-1.8(e) and stated with respect to the proposed contract:

> This rule prohibits an attorney from providing financial assistance to a client in connection with pending or contemplated litigation. The rule, however, contains an exception permitting the attorney to advance court costs and expenses of litigation on behalf of a non-indigent client, the repayment of which may be contingent on the outcome of the matter. See, e.g., Florida Ethics Opinion 72-27; Iowa Opinion 93-2; Mississippi Opinion 225; North Carolina Opinion 124. Although this exception permits attorney and client to agree that the client's repayment of advanced costs and expenses will be contingent on the outcome of

> the matter, it clearly contemplates that such repayment will be made if a sufficient recovery is obtained. In contrast, the inquiring attorney proposes an outright payment of costs for a non-indigent client, rather than an advancement.
>
> The concerns raised by Rule 4-1.8(e) are that of the common law doctrines of champerty and maintenance, as well as the conflict of interest created when an attorney has a personal economic interest in the outcome of the matter. The committee recognizes that the concerns underlying the rule may be minimized when the client is a state agency, but is constrained to apply the rule as it is written. Accordingly, the committee concludes that, under the plain language of Rule 4-1.8(e), it would be ethically impermissible for the inquiring attorney to unconditionally be responsible for all costs and expenses as provided in the proposed agreement.

Nothing in the opinion, or in any subsequent opinion from the committee on the subject, defines "sufficient recovery."

The committee is of the opinion that the inquirer's proposal is permissible under the specific circumstances presented. The committee is of the opinion that the prohibition against a lawyer providing financial assistance to a litigation client expressed by Rule 4-1.8(e) and Florida Ethics Opinion 96-1 is inapplicable to the inquirer's circumstances. The committee believes that both the rule and opinion were intended to prohibit agreements made at the outset of representation for the lawyer to be unconditionally responsible for costs of litigation.

Even assuming the general prohibition against financial assistance is applicable to these circumstances, the committee is of the opinion that the underlying basis for the rule, the common law concerns of champerty and maintenance, does not appear to be present with the inquirer's facts. The inquirer proposes to forgo reimbursement of advanced costs at the end of the matter. The inquirer's decision at the end of representation to "forgive" some of the advanced costs did not affect the inquirer's independent professional judgment during the representation, including giving advice on settlement. The committee is of the opinion that in particular, there is no effect on the inquirer's judgment where the inquirer will not take any fees for the representation.

The committee also is of the opinion that the inquirer's proposal is permissible under these circumstances because, under the facts presented, the settlement is insufficient to cover the client's medical bills and costs associated with the representation. Thus, the committee is of the opinion that the exception allowing a lawyer to advance costs of litigation and make those advanced costs "contingent on the outcome of the matter" would permit the inquirer to reduce the amount of the costs the inquirer seeks to be reimbursed from the recovery, as the recovery is insufficient to cover all medical bills and litigation costs. The inquirer's decision to not seek reimbursement from the client for some of the costs that the inquirer has advanced on behalf of the client is thus contingent on the outcome of this matter: that the settlement does not cover the total amount of the client's medical bills and the costs advanced by the inquirer.

The committee cautions the inquirer to be mindful of the inquirer's obligations to third parties to whom the inquirer owes a legal duty and who have an interest in the settlement funds

held in trust by the inquirer under Rule 5-1.1(f) and the comment, and the inquirer's general obligation of candor expressed in Rules 4-4.1 and 4-8.4(c).

In summary, the committee is of the opinion that the inquirer's proposal not to seek reimbursement for some of the costs the inquirer has advanced on behalf of the client is permissible under these specific circumstances: where there has been no agreement for the inquirer to be unconditionally responsible for the costs at the outset of representation, the cost "forgiveness" occurs after settlement, and the inquirer will receive no fees for the representation. The committee believes that the rule's prohibition is inapplicable because there was no agreement at the outset of representation for the inquirer to be responsible for the costs, and the committee believes that application of the exception to Rule 4-1.8(e) leads to the same result, as the recovery is insufficient to cover all medical bills and litigation costs and the repayment of the costs is therefore "contingent on the outcome of the matter" under the rule.

ETHICAL ISSUES RELATED TO LITIGATION FUNDING PROVIDED BY CREDITORS OR THIRD PARTIES WITH AN EXPECTATION OF FINANCIAL GAIN

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Litigation funding provided by third parties with an expectation of getting a "cut of the pie" or otherwise being entitled to some consideration upon the outcome of litigation in their favor implicate the common law doctrines of maintenance and champerty. Champerty has been generally defined as:

> The act of assisting the plaintiff or defendant in a legal proceeding in which the person giving the assistance has no valuable interest, on an agreement that, if the proceeding is successful, the proceeds shall be divided between the plaintiff or defendant, as the case may be, and the assisting person ... The distinction between champerty and maintenance lies in the interest which the interfering party is to have in the issue of the suit. In the former case, he is to receive a share or portion of what may be recovered; in the latter case, he is in no way benefited by the success of the party aided, but simply [intermeddles] officiously. Thus, every champerty includes maintenance, but not every maintenance is champerty.

The Law Dictionary, *What is Champerty* (2022) (https://thelawdictionary.org/champerty/) (last accessed February 10, 2022) (internal citations omitted). Third-party litigation funding ("**TPLF**") may also be referred to as the assignment or "sale" of a cause of action.

A bankruptcy court for the Northern District of West Virginia addressed a situation involving "champerty," sometimes referred to as assignment, stating: "'assignment,' a 'sale,' an 'abandonment for consideration,' or some other moniker is immaterial ... inasmuch as the effect of the transfer is to divest the bankruptcy estate's interest ... in exchange for full satisfaction of all claims against the estate." *In re Brown*, 354 B.R. 100, 105 (Bankr. N.D. W. Va. 2006). The court continues, "'[m]aintenance' at common law is 'an officious intermeddling in a suit that in no way belongs to the meddler, and signifies an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right.'" *Id.* (quoting *Davis v. Settle*, 43 W. Va. 17, 26 S.E. 557, 560 (1896)). Whereas "'champerty' is a species of maintenance, and 'is the unlawful maintenance of a suit in consideration of part of the matter in controversy.'" *Id.* (quoting *Davis*, 43 W. Va. at 26).

A previous ABI presentation addressed this topic with the speakers stating:

> While such prohibition had its roots in old English common/statutory law, in the US some states still prohibit or materially limit it (*e.g.* Alabama, Colorado, Kentucky, Mississippi, North Carolina, Minnesota, New York and Pennsylvania), while others allow it (perhaps with some restrictions) (*e.g.* Florida, Indiana, Ohio, New Jersey, Tennessee, and Texas).

Salerno, Brass, J. Carey, Gallagher, and Kroop, *THIRD PARTY LITIGATION FUNDING AND ISSUES IT CREATES IN BANKRUPTCY CASES: THIS AIN'T YOUR FATHER'S CONTINGENCY FEE ARRANGEMENT!*, 090717 ABI-CLE 25 (September 7, 2017) (citing Pribisich, "Maintenance, Champerty and Usury: Ethical Issues Of Alternative Litigation Financing", *ABA Presentation* (2015); Beisner, Schwartz, "How Litigation Funding Is Bringing Champerty Back to Life", *Law360* (January 20, 2017) (discussing two cases which invalidated TPLF agreements based on, *inter alia*, the concepts of champerty)).

Addressing ethical concerns of allowing parties to meddle with personal injury tort claims in this way, one court stated that TPLF is typically "forbidden based on a policy that protected the injured party so that an unrelated third-party cannot reap a windfall by paying the injured party a pittance for the claim and then prosecute litigation for injuries that the party never suffered." *Booth v. Moss* (*In re Moss*), No. 03–12672, 2005 WL 2100964, at *2, 2005 Bankr. LEXIS 1667 at *4 (Bankr. M.D. N.C. Aug. 12, 2005).

Illustrative Cases:

In re DesignLine Corp., 565 B.R. 341 (Bankr. W.D. N.C. 2017)

In this liquidating Chapter 11 case, the court, faced with a motion of the liquidating trustee to obtain litigation financing, found that the proposed financing agreement was champertous under North Carolina law and disapproved it as a violation of public policy. The court focused its inquiry on whether under the champertor would have "control" over the actions proposed to be financed under the agreement. Finding that the champertor did, the court noted that the champertor held the "power of the purse" insofar as the liquidating trustee had to seek advances on quarterly basis for which the champertor could decline to provide in its discretion and that the trustee was required to seek permission to increase the litigation budget and to consult with the champertor prior to any change in counsel.

In re Brown, 354 B.R. 100, 105 (Bankr. N.D. W. Va. 2006)

The Chapter 7 Trustee sought to release a prepetition cause of action for abusive debt collection activities against a mortgage lender to debtors in exchange for $40,000, which the debtors planned to fund through a loan from an unidentified third party. Overruling the mortgage lender's objection, the court held that West Virginia law did not prohibit transfer of a personal injury tort claim from the estate back to the debtor and that consideration given by debtors was adequate and it was unnecessary to "auction" debtors' interest to the highest bidder.

Hey Buddy, Can you Spare a Dime? [What is your law license worth?]

Best Practices in Due Diligence and Exercising Reasonable Care When Presenting Sworn Statements on the Contents of Public Records to Federal Courts

Judge McEwen's Mentoring Program
for New Bankruptcy Lawyers

September 30, 2020

Overview

DUE DILIGENCE – WHAT IT REQUIRES

- Prior Cases
- Public Records
- Anomalies
- Law Office Economics

Rules of Professional Conduct

Rule 4-1.2(c): Lawyers may limit scope of representation if it is reasonable under the circumstances and the client gives informed consent

Rule 4-1.3: A lawyer shall act with reasonable diligence

Bankruptcy Code

§ 329. Disclosure of compensation and Court's ability to disgorge

§ 526(c). Contract for services can be voided for negligent representation

§ 707(b)(4)(C) and (D). Signature of attorney indicates attorney performed a reasonable investigation and, after inquiry, information is correct

Sanctions can be imposed pursuant to Rule 9011 for failure to reasonably investigate the accuracy of bankruptcy petition and schedules prior to filing

Reasonable Inquiry

- If can be accomplished with a reasonable expenditure of time and expense
- Not analyzed with benefit of hindsight but time inquiry was made
- Able to rely on documents prepared by 3rd parties such as tax returns

Factors Considered by Courts

Time available and feasibility of investigation

Extent counsel relied on client for factual support

Complexity of factual and legal issues

Reasonableness under the circumstances

Cases to Review

- *In re Robinson*, 198 B.R. 1017 (Bankr. N.D. Ga. 1996) – sets forth 5 requirements for reasonable inquiry imposed by Rule 9011
- *In re Matthews*, 154 B.R. 673 (Bankr. W.D. Tex. 1993) – also states requirements for reasonable inquiry under Rule 9011
- *In re Gutierrez*, 356 B.R. 496 (Bankr. N.D. Cal. 2006) – applied traditional negligence standard when reviewing duty to perform a reasonable inquiry under § 526
- *In re Garrad*, 2013 WL 4009324 – sets forth 5 requirements for reasonable inquiry that must be met to avoid breach of duty under § 526
- *In re Withrow*, 391 B.R. 217 (Bankr. D. Mass. 2008) – Court sets forth similar requirements for reasonable inquiry to be met under § 707
- *In re Kayne*, 453 B.R. 372 (B.A.P. 9th Cir. 2011) – Court applied reasonable inquiry standard to both violations of Rule 9011 and § 707(b)(4)(D) using an objective standard which was followed in *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013)
- *In re Beinhauer*, 570 B.R. 128 (Bankr. E.D. N.Y. 2017) – Court followed reasoning from *In re Robinson, In re Matthews, In re Hanson,* 2015 Bankr. LEXIS 607, *In re Seare*, and *In re Withrow*
- *Desiderio v. Parikh (In re Parikh)*, 508 B.R. 572 (E.D.N.Y. 2014) – attorneys must independently verify publicly available facts to determine if the client's representations are objectively reasonable and investigate further if inconsistencies are raised
- *In re Walton*, 454 B.R. 537 (Bankr. M.D. Fla. 2011) Clark & Washington bifurcated contract (there are multiple cases in multiple states related to Clark & Washington contract issue

Comparing Prior Cases

Attorneys sanctioned for failure to investigate prior bankruptcy petitions and inconsistent information

Kelly v. Cuomo (In re Cuomo), 2013 Bankr. Lexis 2511; 2013 WL 3155425

Public Records

Free/public records should be reviewed to verify information

- Sunbiz – officer/director, company interest
- UCC filings
- Secured transaction registry
- Official records – deeds, judgments, etc.
- Court records – pending lawsuits
- Pacer – while not free, should be checked for prior bankruptcy petitions

Anomalies

Is there a car payment but no car listed?

Is there a mortgage lender but no property listed?

Is there a spouse but no spouse income?

Is there a lawsuit but no matching creditor on Schedule D of F?

Key Takeaways from U.S. Trustee's Office

ONE:
Observe bifurcated contract requirement outlined in W*alton*

TWO:
Confirm client's SSN

THREE:
Confirm COVID-19 related issues with documentation

FOUR:
Don't list identical claims on D and E/F

FIVE:
Non-filing spouse income needs to be listed on Schedule I

SIX:
Provide support for attorney fees over the "presumptively reasonable" amount

Chapter 7 Review Checklist

- ☐ **Prior Bankruptcy Filing** ☐ **Printout**
- ☐ **Two Years Residency**
- ☐ **⇑ 1216**
- ☐ **Property Appraiser Value for Real Estate** ☐ **Printout**
- ☐ **Kelly Blue Book for All Vehicles** ☐ **Printout**
- ☐ **Court Records Review** ☐ **Printout**
- ☐ **Official Records Review** ☐ **Printout**
- ☐ **Review PACER for Civil Cases** ☐ **Printout**
- ☐ **Reconcile "A" to "D"**
- ☐ **Reconcile "J" with "B" and SOFA**
- ☐ **Debtor's Work Address on "I"**
- ☐ **Verify Pay Stub Spreadsheets jive with:**
  - ☐ **Schedule I** ☐ **YTD SOFA** ☐ **B-22**
- ☐ **Document Amount of Non-Exempt Assets**
- ☐ **Check Tax Returns Against SOFA**
- ☐ **SunBiz (Prior Corp. Info)** ☐ **Printout**
- ☐ **SunBiz (UCC Filing)** ☐ **Printout**
- ☐ **Date for Payment of Fees & Costs (SOFA)**
- ☐ **$$ in Budget for Re-Aff's**
- ☐ **Review Bank Statements**

Chapter 13 Review Checklist

- ☐ **Prior Bankruptcy Filing** ☐ **Printout**
- ☐ **Two Years Residency**
- ☐ **⇑ 1216**
- ☐ **Jurisdictional Limits**
- ☐ **Property Appraiser Value for Real Estate** ☐ **Printout**
- ☐ **Kelly Blue Book for All Vehicles** ☐ **Printout**
- ☐ **Court Records Review** ☐ **Printout**
- ☐ **Official Records Review** ☐ **Printout**
- ☐ **Review PACER for Civil Cases** ☐ **Printout**
- ☐ **Reconcile "A" to "D"**
- ☐ **Reconcile "J" with "B" and SOFA**
- ☐ **Debtor's Work Address on "I"**
- ☐ **Verify Pay Stub Spreadsheets jive with:**
  - ☐ **Schedule I** ☐ **YTD SOFA** ☐ **B-22**
- ☐ **Document Amount of Non-Exempt Assets**
- ☐ **Liquidation**
- ☐ **Check Tax Returns Against SOFA**
- ☐ **SunBiz (Prior Corp. Info)** ☐ **Printout**
- ☐ **SunBiz (UCC Filing)** ☐ **Printout**
- ☐ **Date for Payment of Fees & Costs (SOFA)**
- ☐ **Commitment Period**
- ☐ **Feasibility**

Straight & Narrow

BY G. THOMAS CURRAN JR.

How Much Diligence Is Due?

Defining an Attorney's Duty to Perform a Pre-Petition Inquiry

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With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), it is more important than ever for us, as debtors' attorneys, to acknowledge the duties that we owe to our clients before filing a petition for bankruptcy relief. An attorney's duties of full disclosure and candor to the court are essential to maintaining the integrity of the bankruptcy system. Moreover, with the addition of 11 U.S.C. § 526(a)(2) (along with other pre-existing Bankruptcy Code provisions), a debtor's attorney who fails to disclose information on a petition or pleading risks civil penalties, attorneys' fees and costs, attorney disciplinary measures[1] or even criminal charges.[2]

The Bankruptcy Code has always emphasized an attorney's duty to truthfully disclose all known assets, liabilities and financial affairs in the debtor's schedules and pleadings. At least as early as the Bankruptcy Reform Act of 1978,[3] a debtor's attorney who signed a petition or other pleading certified that the attorney performed a reasonable investigation into the financial affairs of his or her client to ensure that the pleading was well grounded in fact.[4]

However, BAPCPA extended this duty through the enactment of 11 U.S.C. § 526(a)(2) to apply to any person who qualifies as a "debt relief agency,"[5] which aims to prevent abusive practices by bankruptcy professionals, as well as to ensure that all of a debtor's financial information is taken into account in administering his or her estate.[6] Although most debtors' attorneys make it a habit to review online court records, official records, property appraiser's reports and other available information, provisions like 11 U.S.C. §§ 526(a)(2) and 707(b)(4)(D), as well as Federal Rule of Bankruptcy Procedure 9011, may require additional probing prior to filing a bankruptcy petition.

The "Reasonable Inquiry" Standard under 11 U.S.C. § 526(a)(2)

Section 526(a)(2) of the Bankruptcy Code provides the following:

> A debt relief agency shall not ... 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.

The requirement that an attorney exercise reasonable care in determining the accuracy of the information contained in a debtor's petition and schedules is often referred to as the "reasonable inquiry" standard. Section 526(a)(2) makes the attorney or debt-relief agency liable to the client for erroneously omitting critical information without investigating the truth or falsity of the alleged facts. An attorney who fails to perform a reasonable inquiry can be subject to disgorgement of fees to the debtor and civil penalties, and can be required to pay the attorneys' fees and costs of either the debtor, the state or U.S. Trustee.[7]

In re Gutierrez: Application of a Traditional Negligence Standard

Since 2005, several courts have explored the scope of a debt-relief agency's duty to perform a reasonable inquiry under § 526. In *In re Gutierrez*, a debtor sought the full return of all fees paid to his attorney after alleging that the attorney failed to exercise reasonable care before filing his petition.[8] The debtor first met with the attorney on March 13, 2006. The attorney prepared the debtor's petition, schedules and statements, which disclosed a home owned by the debtor. After their first meeting, but before filing the petition, the debtor quit-claimed his interest in the home to his nonfiling spouse and recorded the deed. The debtor met with the attorney to file the petition almost two months after their first meeting, but the attorney did not ask whether any information had changed or become inaccurate since their last meeting, so the transfer was not disclosed.

The U.S. Bankruptcy Court for the Northern District of California held that the attorney did not violate 11 U.S.C. § 526(a)(2) by failing to ask whether the debtor's circumstances had changed prior to the filing.[9] The court applied a negligence standard, reasoning that the debtor would not have

1 Most states' rules regulating attorney conduct require an attorney to be candid with the court. *See, e.g.*, Model Rules of Prof'l. Conduct R. 3.3.
2 *See* 18 U.S.C. §§ 151-158.
3 S. Rep. No. 95-989 (1978).
4 *See, e.g.*, 11 U.S.C. § 707(b)(4)(C).
5 A "debt relief agency" includes any person who provides bankruptcy assistance to a consumer debtor for a fee, which generally includes attorneys. For a more complete discussion on whether attorneys are considered "debt relief agencies," *see Milavetz, Gallop & Milavetz PC v. U.S.*, 559 U.S. 229, 235-39 (2010).
6 *Id.* at 236 n.3.
7 11 U.S.C. § 526(c).
8 *In re Gutierrez*, 356 B.R. 496, 500 (Bankr. N.D. Cal. 2006).

told the attorney about the transfer even if the attorney had asked.[10] The debtor had more than one opportunity to tell the attorney about the transfer and still failed to do so. As a result, the debtor was not able to prove causation, a crucial element to any negligence claim.[11]

Comparing § 526(a)(2) to Rule 9011

Other courts have compared the reasonable-inquiry standard under § 526(a)(2) to the one set forth in Bankruptcy Rule 9011.[12] Rule 9011 similarly requires an attorney to perform an "inquiry reasonable under the circumstances" before signing or filing any petition or pleading. A party that violates Rule 9011 is subject to a fairly broad range of sanctions, including monetary and non-monetary sanctions, as well as attorneys' fees and costs.[13]

For example, in *In re Garrard*, a slip opinion from the U.S. Bankruptcy Court for the Northern District of Alabama, the court applied the Rule 9011 definition of "reasonable inquiry" to a violation of 11 U.S.C. § 526(a)(2).[14] In this case, an attorney's duty to perform a reasonable inquiry requires five things:

> (1) to explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) to ask probing and pertinent questions designed to elicit [such disclosure]; (3) to check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent; (4) to demand of the debtor full, complete, accurate, and honest disclosure ... before the attorney signs the petition; and (5) to seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.[15]

If an attorney fails to meet one of these requirements, he or she has breached the duty to perform a reasonable inquiry. In other words, an attorney cannot turn a blind eye to potential inconsistencies in the debtor's petition and absolve himself or herself from liability. He or she must take an active role in the debtor's case to ensure that the documents are complete, accurate and honest.

Courts in the First Circuit have implemented a similar five-factor test to evaluate violations of 11 U.S.C. § 707.[16] Like the test in *Garrard*, the First Circuit requires an attorney to advise the debtor of the importance of full disclosure; check for internal consistency throughout the petition, schedules, and statements; and promptly correct information that he or she discovers to be inaccurate. However, in *In re Withrow*, the court also required the attorney to employ "external verification tools," such as title records, court records, lien searches and tax transcripts, as long as the tools that were used were not overly costly or time-consuming for the attorney.[17]

The courts in *Gutierrez* and *Garrard* agreed that a negligence standard should apply to violations of § 526. *Gutierrez* applied the typical "but-for" test to address the issue of causation, which prompted the court to ask whether a more detailed inquiry by the attorney would have revealed the undisclosed information. *Garrard*, on the other hand, defined a "breach." Comparing an offending attorney's conduct to that of a reasonably competent attorney measures whether the attorney breached his duty of reasonable care. Based on the language of the statute and the prevailing case law, a court should only find that a violation of § 526 exists after it fully analyzes the claim under a traditional negligence standard. Although no court has explicitly stated this, it can be inferred from its application.

The "Reasonable Investigation" Standard under 11 U.S.C. § 707

The "reasonable inquiry" standard is often compared to the "reasonable investigation" standard under 11 U.S.C.

9 Even though the court absolved the attorney of violations under 11 U.S.C. § 526, it ultimately ordered the disgorgement of fees due to violations of 11 U.S.C. §§ 527 and 528 for failure to provide required notices and a fully executed copy of the fee agreement. *Id.* at 506.

10 *Id.* at 501-02.

11 *See also Conn. Bar Ass'n v. U.S.*, 620 F.3d 81, 103 n.22 (2d Cir. 2010) (stating that violation of 11 U.S.C. § 526 is not based on strict liability, but instead requires culpable state of mind by showing either negligence or intent).

12 *See In re Casavatencia*, 389 B.R. 496 (Bankr. S.D. Fla. 2008); *In re Garrard*, Nos. 13-40418-JJR13, 13-40419-JJR13, 2013 WL 4009324 (Bankr. N.D. Ala. 2013) (applying same five-factor "reasonable inquiry" test to violations of 11 U.S.C. §§ 526 and 707, and Rule 9011).

13 Fed. R. Bankr. P. 9011(c)(2).

14 *Garrard*, 2013 WL 4009324, at *4.

15 *Id.* (quoting *In re Thomas*, 337 B.R. 879, 892 (Bankr. S.D. Tex. 2006).

16 *In re Withrow*, 391 B.R. 217, 228 (Bankr. D. Mass. 2008) (holding that attorney who failed to list six bank accounts on Schedule B and claim any exemptions on Schedule C was subject to sanctions for failing to perform reasonable investigation under 11 U.S.C. § 707(b)(4)(C) and (D)).

17 *Id.*

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Straight & Narrow: How Much Diligence Is Due? Pre-petition Inquiry

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§ 707(b)(4)(D).[18] Under § 707(b)(4)(D), an attorney who signs a petition certifies that he or she has no knowledge that the information contained in the client's petition is incorrect after performing an inquiry. Unlike § 526(a)(2), violations of § 707 usually result in the dismissal of the debtor's case. However, similar to § 526(c), if a debtor's attorney violates § 707(b), the court may also assess civil penalties and award attorneys' fees and costs.[19]

The Ninth Circuit noted this comparison in *In re Kayne*.[20] In *Kayne*, a debtor told her attorney prior to filing that she had filed a lawsuit against a third party to recover money that was owed under a promissory note. To make matters worse, the debtor provided the attorney with a binder of documents that included a copy of a settlement agreement on the note and a list of payments received by the debtor, which the attorney did not review. As a result, the attorney did not disclose the note on the Schedule B and failed to list payments received as income on the Schedule I. The attorney believed that the payoff on the note was approximately $7,000 (an amount that would have been protected by the debtor's exemptions), and he explained this to the chapter 7 panel trustee at the meeting of creditors. After reviewing the settlement agreement, however, the trustee discovered that there was actually $61,250 owed on the note. The attorney admitted that he should have conducted a more thorough investigation before filing the petition.

The Ninth Circuit Bankruptcy Appellate Panel held that the debtor's attorney did not conduct a reasonable investigation into the facts of the case prior to filing the petition.[21] The court applied the same "reasonable inquiry" standard to both violations of Rule 9011 and § 707(b)(4)(D). It reasoned that the "reasonable inquiry" standard is an objective one wherein the attorney's conduct should be compared to that of "a competent attorney admitted to practice before the involved court."[22] Because the attorney did not ask pertinent and probing questions or otherwise gather adequate information, the court imposed $20,000 in sanctions.

Other courts in the Ninth Circuit have looked favorably on the analysis in *Kayne*. In *In re Seare*, the U.S. Bankruptcy Court for the District of Nevada applied *Kayne*'s reasoning in holding that an attorney violated § 707(b)(4)(D) when he failed to investigate the dischargeability of a debt that arose from a judgment for fraud.[23] Even though the debtor's attorney filed the debtor's petition on an "emergency" basis to stop a garnishment, the court did not excuse him from compliance with § 707(b)(4)(D).[24] The attorney quickly reviewed the documents that the debtor provided to him prior to filing and made the incorrect determination that the debt underlying the garnishment would be dischargeable. The debtor did not have a copy of the judgment on the debt and therefore did not provide it to the attorney.

The court reasoned that if the attorney had reviewed the records on the court's PACER website and read the judgment prior to filing, he would have discovered that the debt was incurred due to the debtor's fraud upon the court and that the debt would be nondischargeable. The court concluded that an attorney cannot rely on the information that his or her client provides if it is clear that the information is "incomplete or inconsistent, or raises a 'red flag.'"[25] The existence of a judgment against the debtor should have alerted the attorney to the fact that a further inquiry was necessary. After that discovery, the attorney had an obligation to take an active role in the debtor's case and thoroughly review the judgment.

> **If a debtor fails to provide certain requested documents or cannot explain inconsistencies in his schedules, the attorney can wait to file the case, refuse to file altogether, or refuse to represent the debtor.**

Conclusion

Although various courts have different ways of defining "reasonable inquiry," they are generally aligned when determining what constitutes a violation. The standard is an objective one: An attorney cannot defend himself or herself by claiming that he or she was subjectively ignorant to the murky facts of the debtor's case. Allowing such a defense would promote purposeful ignorance and result in many unwelcome surprises for unsuspecting debtors. Although not every circuit has specifically defined "reasonable inquiry" as it applies to § 526, the current trend suggests that an attorney should apply the Rule 9011 standard in the absence of such a definition.

As debtors' attorneys, we should always review relevant court records, online title and lien searches, tax transcripts, and other readily available documents. We have a clearly defined duty to ask probing questions that elicit honest and accurate answers, resolve internal and external inconsistencies by conducting a cost-effective investigation, and verify information provided by clients by requesting pertinent documents. If a debtor fails to provide certain requested documents or cannot explain inconsistencies in his schedules, the attorney can wait to file the case, refuse to file altogether, or refuse to represent the debtor. A brief and effective investigation before filing a petition can help prevent the potential costs of a violation of § 526 or Rule 9011. Even more importantly, it can facilitate the successful administration of a debtor's case. abi

18 The "reasonable investigation" language actually derives from § 707(b)(4)(D)'s sister statute, 11 U.S.C. § 707(b)(4)(C), which provides that an attorney's signature certifies that he or she "performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion."
19 11 U.S.C. § 707(b)(4)(A) and (B).
20 453 B.R. 372 (B.A.P. 9th Cir. 2011).
21 *Id.* at 380.
22 *Id.* at 382 (quoting *Smyth v. City of Oakland (In re Brooks-Hamilton)*, 329 B.R. 270, 283 (B.A.P. 9th Cir. 2005)).
23 *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013).
24 *Id.* at 212.
25 *Id.*

The following "Bankruptcy Questionnaire" was developed and is made available by the National Consumer Law Center (www.nclc.org).

You may locate it on the web at NCLC Bankruptcy Questionnaire.

Bankruptcy Questionnaire

This questionnaire is also available in English and Spanish versions, in both Microsoft Word and Adobe Acrobat (PDF) format, on this manual's companion website. Use the PDF format if you wish to reprint the questionnaire, and the Word format if you want to edit the document using your word-processing program.

Bankruptcy is a right provided by law to people who are deeply in debt and in need of a fresh start. Bankruptcy will discharge many of your debts and you will not have to pay them, except that mortgages and other liens may still need to be paid if you want to keep the secured property.

The law allows you to keep some money and most types of necessary property in bankruptcy. To receive this protection, it is necessary that you list all items asked for in the following questions: if you do not list an item, that item will not be protected in bankruptcy.

You must also list everyone to whom you owe money. If you leave out one of your creditors, you may have to pay the money owed to that creditor or you may lose your right to a bankruptcy discharge. It may also be considered a crime if you intentionally give false information or leave out information.

If you have any questions about whether you can keep certain property or whether you should list a debt, write that question down and remember to ask the lawyer. We know this questionnaire is long. Preparing your bankruptcy papers properly takes a significant amount of time and a great deal of information. If we work together to do so, we can protect your family from great hardship and give you the new start the law intends you to have.

There is a filing fee of $306 which must be paid to the court in chapter 7 cases, and $281 if your case is filed under chapter 13. If you do not have the money at the time you file, the court may allow you up to four months to pay the fee in installments. If you are unable to pay the filing fee even in installments, you may request that the court waive the filing fee. This right to request a filing fee waiver applies only in chapter 7 cases. Some of the information requested on this questionnaire will be needed to prepare a request to waive the filing fee. If you do not request a filing fee waiver or the court does not approve your request, you must pay the filing fee to get a discharge.

You must also receive budget and credit counseling from an approved credit counseling agency within 180 days before your case is filed. It is usually a good idea for you to meet with us before you receive the credit counseling. We can provide you with a list of approved credit counseling agencies. Different agencies provide the counseling in-person, by telephone, or over the Internet. You should fill out this questionnaire before meeting with the credit counseling agency and refer to it as needed. You will need to get from the agency a certificate showing that you received the counseling before your bankruptcy case was filed, unless the agency provides the certificate to us directly.

Most approved agencies charge between $20–$50 for the pre-filing counseling. However, the law requires approved agencies to provide bankruptcy counseling and the necessary certificates without considering an individual's ability to pay. If you cannot afford the fee, you should ask the agency to provide the counseling free of charge or at a reduced fee.

After your case is filed, you will need to attend a meeting with the bankruptcy trustee and you may have to appear at a court hearing. Before the court will give you a discharge, you must also complete an approved course in personal finances. This course will take approximately two hours to

complete. We will give you a list of organizations that provide approved courses. In a chapter 7 case, you should sign up for the course soon after your case is filed. If you file a chapter 13 case, we will discuss with you later when you should take the course.

(1) Fill out every question on all of the pages. Wherever you are given a choice of YES or NO on these forms, check either YES or NO, whichever is correct. Please fill out these pages as well as you can. We will help with any questions you don't understand.

(2) Write clearly or typewrite your answers. We must be able to read them.

(3) Wherever the name of a person or firm is asked for, give the full address. Make the address accurate. Your discharge from each debt depends upon your giving a complete and correct address.

(4) If you do not know the exact amount you owe, fill in a HIGH estimate. Do not leave the amount blank and do not say "don't know." If you dispute owing a debt or the amount claimed, still list the debt and note that it is disputed.

(5) Wherever you need more room, turn the page over and put the information on the back together with the number of the question.

(6) List every creditor and everybody that has had anything to do with your debts, including cosigners. Please include accurate account numbers. If a bill you owe has been sent to a collection agency or any attorney, list both the person you originally owed and the collection agency or any attorney, giving the full address of each. If the collection agency has an attorney, list the person you originally owed, the collection agency, and the attorney, giving the full address of each.

(7) Whenever a question asks you to be prepared to give details, gather all papers concerning the matter, including bills and collection letters, and bring them with you when you return this form. In any event, be sure to bring with you the following items (unless they don't apply to you):

(a) Picture identification card and Social Security card or other document containing your social security number;

(b) Deeds and mortgages on your house or other real estate, including any agreements you later entered into to modify any mortgage loans;

(c) Any insurance policies;

(d) Any papers relating to past bankruptcies you or your spouse have filed or that concerned any of your property, including chapter 13 cases;

(e) Copies of your tax returns for the past four years;

(f) Copies of your pay check stubs for the last sixty days (and you should keep all pay stubs you receive until your bankruptcy case is over) and any proof of your income and your spouse's income for the past six months (such as pay stubs for the entire period, pay stubs which list year-to-date income, or W-2 statements);

(g) Copies of your last several statements for each bank, credit union, and investment or brokerage account, and copies of statements for any retirement or savings accounts, including IRAs, Roth IRAs, education IRAs, 401(k)s, tuition credit programs and medical savings plans (and you should

keep the first bank statement you receive after your case is filed as we may need to provide it to the trustee);

(h) Legal papers, lawsuits, foreclosure notices, tax sale notices, repossession notices, garnishment notices, eviction notices, divorce papers, separation agreements, alimony orders, and child support orders;

(i) Notices of federal tax lien, notices of levy, or other collection notices from the Internal Revenue Service (IRS) or state or local taxing authorities;

(j) If your mortgage is in foreclosure, any notices you received from your mortgage company or its attorney showing the total amount you owe, the amount needed to get current, and the date of any scheduled foreclosure sale;

(k) Any notices informing you that a new company has taken over the ownership or servicing of your mortgage;

(l) Any appraisals or tax assessment papers;

(m) Any other papers you have concerning any of your debts;

(n) Any lease or installment sale ("lease purchase" or "rent-to-own") agreements for housing (apartment, house, mobile home) or other property (cars, televisions, etc.) that you have signed and that are still in effect or not fully paid; and

(o) Any documents showing that someone else regularly contributes to your household expenses.

Complete All Questions. If you and your spouse are not living together, and there is no possibility that your spouse will file bankruptcy along with you, you don't have to answer the questions about your spouse.

1. Name and Residence Information:

A. Your full name: _____

Your spouse's full name: _____

B. Your Social Security Number: _____

Your spouse's Social Security Number: _____

C. Your date of birth and age: _____

Your spouse's date of birth and age: _____

D. List any other names used by you or your spouse (including maiden name), or other ways you have signed your names to papers and checks during the last eight years:

_____

_____

_____

_____

E. Current Address: _____

(Street)

_____

(City) (County) (Zip Code)

F. Telephone Number: _____

G. List all addresses you have had in the last three years, the dates when you lived there, and the name you used while living there. If you and your spouse are filing bankruptcy together, list addresses for each for the last three years (include street, town, and zip code).

Addresses	*Date Moved In*	*Date Moved Out*	*Name Used*

2. Prior Bankruptcy: Have you or your spouse ever been involved before in a bankruptcy (chapter 7, 11, 12, or 13)? YES___ NO___. If YES, bring *all* papers from the case(s) to our office.

What Chapter?	*Date Case Filed*	*Did You Get a Discharge?*	*If Yes, List Date of Discharge*	*If Dismissed, List Date and Reason Why Dismissed*

3. Other Bankruptcies: Have there been any other bankruptcies filed by someone other than you or your spouse to stop a foreclosure on your home? YES _____ NO _____. If YES, give details: _____

_____

_____

4. Occupation and Income:

A. Usual type of work: _____

B. Name and address of current employer: _____

_____

C. Spouse's usual type of work: _____

D. Name and address of spouse's current employer: _____

_____

E. How long have you been at your current job? _____ Your spouse? _____

F. List all income received in the last six months by you and your spouse (do not list your spouse's income if you are not filing bankruptcy together and you are legally separated):
(Bring a copy with you to our office of all pay stubs or other records from your employer of all pay received within the past sixty days.)

	Income Received (Give gross income)	*Source* (Names and addresses of employers or specify social security, welfare, unemployment, child support, self-employment, investments, etc.)	*By Whom* (Self or Spouse)
1 month ago:			
2 months ago:			
3 months ago:			
4 months ago:			
5 months ago:			
6 months ago:			

List all income received so far this year and in the last two years by you or your spouse:

	Income Received (Give gross income as reported on tax returns)	*Source* (Names and addresses of employers or specify social security, welfare, unemployment, child support, self-employment, investments, etc.)	*By Whom* (Self or spouse)
So far this year:			
Last year:			
Year before last:			

G. Have you or your spouse been in business by yourself or with others during the last six years? YES ____ NO ____. If yes, give the dates, name of the business, its address, and the names of others in business with you or your spouse. _____

H. Are there any debts from your former business? YES ___ NO ___. If YES, list them in questions 32 and 33 and give details here: _____

I. (1) If you employed anyone (such as regular employees, cleaning people, gardeners, babysitters), do you still owe them wages? YES ___ NO ___. If YES, give name and address of employee, dates worked, amount owed, and work done. _____

(2) Has anyone given you money to purchase property or services that you were unable to provide? YES ___ NO ___. If YES, give details: _____

J. Have you ever been on welfare within the past two years? YES ___ NO ___. Has anyone in your immediate family? YES ___ NO ___. If YES to either question, specify the persons, dates, amounts received, and places (if state welfare, name the state; if local welfare, name the city or county).

K. Have you ever received or been told you have received more money from the government than you were supposed to (such as social security, welfare, unemployment compensation, food stamps, etc.)? YES _____ NO _____. If YES, give details: _____

L. Do you have any vacation time that is due you from your employer? YES _____ NO _____. If YES, how much is due? _____

M. Do you have an IRA (including Roth or education IRA) or any other pension plan? YES ____ NO _____. If YES, give details: _____

_____

N. Have you paid or contributed any funds to a tax-exempt tuition program, or purchased any tuition credits or certificates? YES _____ NO _____. If YES, give details: _____

_____

O. Are you the beneficiary of a trust or future interest? YES _____ NO _____. If YES, give details: _____

_____

_____

P. Do you expect to receive more than a small amount of money or property at any time in the near future by way of gift or life insurance proceeds? YES _____ NO _____. If YES, give details: _____

_____

_____

Q. (1) Do you expect to inherit any money or property in the near future? YES ___ NO ___.
If YES, give details: _____

_____

(2) Has anyone died and left you anything (including insurance benefits)? YES ___ NO ___.
If YES, give details: _____

_____

5. Taxes: (***Bring a copy of your W-2 forms and any tax returns you have filed within the past year with you to our office***.)

A. Have you received any tax refunds this year? YES ___ NO ___. State $ _____ Federal $ _____

B. What income tax refunds do you expect to receive this year? State $ _____ Federal $ _____

C. Does this amount include an Earned Income Credit? YES _____ NO _____.

D. Have you already filed for the refund? YES _____ NO _____.

E. When do you expect to receive the tax refund? _____

F. Do you know if anyone intends to take or intercept your tax refund? YES __ NO __. If YES, give details.

_____

G. Did you sign an agreement or refund anticipation loan with a tax preparer to get your refund early? YES _____ NO _____.

H. (1) Is any other person (such as your spouse) entitled to part of your refund? YES ___ NO ___.

(2) Have you filed income tax returns every year for the last seven years? YES ___ NO ___.

(3) Do you have copies of your income tax returns filed in the last four years? YES ____ NO ____. If NO, state the years for which you do not have copies: _____

(4) Do you owe any taxes to the United States? YES ___ NO ___. If YES, give the name and address of the department or agency to which the tax is owing, the kind of tax that is owing, and the years for which the tax is owing: _____

_____

_____

(5) Do you owe any taxes to any states? YES _____ NO _____. If YES, give the name of the state and the department or agency therein, the address of the department or agency, the kind of tax that is owing, and the years for which the tax is owing: _____

_____

(6) Do you owe any taxes to a county, district, or city? YES _____ NO _____. If YES, give the name of the county, district, or city, the kind of tax that is owing, and the years for which the tax is owing:

_____

_____

(7) Besides taxes, do you owe any other money to any branch of the United States Government (e.g., FHA, VA, repossessions or loans, withholding taxes [if you were in business], or money owed Small Business Administration)? YES _____ NO _____. If YES, give the name of the branch, its address, the amount owing, and why it is owed: _____

_____

_____

6. Debts Repaid:

A. If you have made any payments totaling more than $600 to a creditor within the last ninety days, give the name of the creditor and the dates and amount of the payments:

Creditor's Name & Address	*Is the Creditor a Relative?*	*Payment Dates*	*Amount of Payment*

Please make sure to bring any payment books you have with you.

B. Have you made any payments within the last year to creditors who are or were insiders (relatives or business partners)? YES _____ NO _____. If YES, give details:

_____

_____

_____

C. (1) Have you ever had a student loan or cosigned for someone else's student loan? YES ___ NO ___.
If YES to either question, please state:

(2) Who lent you the money? _____

(3) What school was the loan for? _____

(4) Did the student finish the course of study at the school? YES _____ NO _____. If NO, why not?

_____

(6) Who is trying to collect the debt? _____

(7) How much have you paid on the debt (include any tax refund intercepts)? _____

(8) Has anyone else made payments on the debt? YES ____ NO _____. How much? $_____

7. Suits: (*Bring in all papers relating to any suits or criminal cases.*)

A. Have you ever been sued by any person, company, or organization? YES ___ NO ____. If YES, state:

Case Name	*Case No.*	*Court's Name and Address*	*Type of Case*	*Result of Case*

B. Have any court suits resulted in a lien being placed on your property? YES _____ NO _____.

C. Have you ever sued any person, company, or organization? YES ____ NO ____. If yes, state:

Case Name	*Case No.*	*Court's Name and Address*	*Type of Case*	*Result of Case*

D. Do you have any criminal charges or convictions? YES ____ NO ____. If yes, state:

Case No.	*Court's Name*	*Charges*	*Result of Case*	*Do You Owe Fines, Restitution, or Any Other Money?*

E. Have you been involved in any administrative agency cases (unemployment compensation, worker's compensation, etc.) in the past 12 months? YES ____ NO ____. If yes, state:

Case Name	*Case No.*	*Agency's Name and Address*	*Type of Case*	*Result of Case*

F. Do you have any possible reason for suing someone for damage to your property or for injuries to yourself or other members of your family? YES _____ NO _____. If YES, who could you sue, how much money is involved, and why could you sue? _____

8. Garnishment, Attachment, and Sheriff's Sale:

A. Have you ever had any property listed for or sold at a foreclosure, tax sale, or sheriff's sale, or levied upon? YES _____ NO _____. If YES, bring any papers concerning those actions to the office and state:

What Property Was Sold or Listed for Sale	*Value of Property*	*Date*	*Name and Address of Creditor*

B. Has money from your pay check or bank account been garnished, or taken or frozen by a creditor, including your bank or credit union, because of a debt? YES ____ NO ____. If YES, give the following:

Name and Address of Creditor Who Received the Money	*Amount Taken*	*Dates*

9. Repossessions and Returns:

A. Have you had any property or merchandise repossessed during the last two years? YES ____ NO ____.

If YES, bring all papers including all letters telling you of the repossession or sale.

Description of Property	*Month & Year of Repossession*	*Who Repossessed Item (Name, Address)*	*Value of Property When Repossessed*

B. Have you voluntarily returned any property or merchandise to the seller in the past two years?

YES _____ NO _____. If YES, state:

Description of Property	*Month & Year of Return to Seller*	*Seller's Name and Address*	*Value of Property at Time of Return*

10. Property of Yours Held by Someone Else:

A. Does any other person have any of your property? (This includes any check you may have given to a payday lender or check cashing service.) YES _____ NO _____. If YES, list the following:

Type of Property	*Value*	*Being Held By (Name and Address)*	*Why Is This Person Holding the Property?*

B. Have you given or made an assignment of any of your property for the benefit of your creditors or any settlements with your creditors within the past two years? YES _____ NO _____. If YES, give the name and address of the creditor and the terms and conditions under which you gave the property to the creditor or made an agreement with the creditor: _____

C. Is any of your property in the hands of a court-appointed person (a receiver), or in the hands of a person who is holding it for your benefit and use (a trustee)? If YES, give details:

D. Is any of your property in the possession of a pawnbroker, storage company or repairman?

YES_____ NO _____. If YES, describe and give its value: _____

11. Gifts and Transfers:

A. Have you made sales of property, mortgages, gifts, or transfers of any substantial property or cash within the last four years? YES _____ NO _____. If YES, give the following:

Name of Person Who Received Property	*Description of Property*	*Month and Year of Gift or Sale*	*Was Sale or Gift to a Relative?*

B. Have you used any money from the sale or transfer of any property within the past ten years to purchase or improve your current home, or to pay down the mortgage? YES _____ NO _____ . If YES, give the following:

Description of Property Sold or Transferred	*Month and Year of Sale or Transfer*	*Amount You Got from Sale or Transfer*	*How Much of This Amount Was Used to Buy or Improve Your Home?*

12. Losses:

A. Did you lose any substantial amount of money as a result of fire, theft, or gambling during the last year? YES _____ NO _____. If YES, state the following:

What Caused the Loss?	*Value of the Money or Property That Was Lost*	*Date of the Loss*

B. Did insurance pay for any part of the loss? YES__ NO__. If YES, what was date of payment? _____
How much was paid? $ _____

13. Payments or Transfers to Attorneys, Credit Counselors, or Debt Consultants:

A. Give the date, name, and address of any attorney or bankruptcy consultant (petition preparer, typing service, document preparation service, independent paralegal) you have consulted during the past year:

B. Give the reason for which you consulted the attorney or bankruptcy consultant:

C. How much have you paid the attorney or bankruptcy consultant? $ _____

D. Did you promise to pay money to the attorney or bankruptcy consultant? YES _____ NO _____. If YES, give the amount and terms of the agreement: _____

E. Give the name and address of any credit counseling agency or debt settlement company you have consulted during the past year and the date when you consulted them: _____

F. Did the agency have you sign up for a plan to repay or settle your debts? YES _____ NO _____. If YES, give the amount and terms of the plan (*and bring a copy of the plan with you to our office*): _____

_____

G. How much have you paid the agency or company? $ _____

H. Have you consulted anyone else about your debts in the past year? YES _____ NO _____. If YES, give name, address, and amount(s) paid for the service: _____

_____

_____

I. Did any of your debts result from a refinancing or a consolidation loan? YES ___ NO ___. If YES, which ones?

_____

_____

Please be sure to bring all papers for these loans with you.

14. Closed Bank Accounts:

Have you or your spouse had your name on any bank account (such as savings, checking, certificates of deposit) during the past 12 months that is now closed? YES __ NO __. If YES, state:

Bank's Name and Address	*Acct No.*	*Type of Account (Savings/Checking)*	*Other Names on Account*	*Date Closed*	*Final Balance*

15. Safe Deposit Boxes:

Have you or your spouse had a safe deposit box during the last year? YES _____ NO _____.
If YES, list the name and address of the bank, the name and address of everyone who had access to the box, the contents of the box and, if you no longer have the box, the date it was closed:

_____

_____

_____

16. Property Held for Another Person: Do you have any money, property, furniture, etc. that belongs to another person or that you are holding for the benefit of someone else (in trust)? YES ____ NO____. If YES, what is the property, who owns it, and what is it worth? Include name and address of the owners:

Type of Property	*Value*	*Owned By*	*Address*	*Relative? (Yes or No)*

At what address are you keeping this property? _____

17. Leases: Have you had an auto lease, rent-to-own, or rental-purchase transaction in the past four years?
YES _____ NO _____. If YES, give details: _____

_____

_____

_____

18. Cooperatives: Are you a member of any type of cooperative (housing, food, agricultural, etc.)? If YES, give details:

_____

_____

_____

19. Alimony, Child Support, and Property Settlements:

A. Have you had any previous marriages? YES __ NO __. If YES, what is the name of your former spouse?

_____

Please be sure that any debts from prior marriages which were never paid are listed with your other debts.

B. Does anybody owe you any money or child support? YES _____ NO _____.
Who? _____ How much? $_____

C. Have you ever been ordered to pay child support? YES ____ NO ____.
Alimony? YES ____ NO ____.
Property Settlement? YES ____ NO ____.
If yes to any question, state:

(1) To whom do you make the payments? _____

(2) Are you behind in your payments? _____

(3) Are the persons you are required to support this way on welfare? _____

(4) Do you have any family court hearings coming up? If YES, explain and give dates:

_____

_____

D. Do you expect to be involved in a property settlement with your spouse or former spouse in the near future?
YES _____ NO _____.

20. Accidents and Driver's License:

A. Have you been involved in a vehicle accident in the last four years? YES ____ NO ____.

B. Has your vehicle been involved in an accident in the last four years? YES ____ NO ____.

C. Have your children ever injured anyone else or their property? YES ____ NO ____.

D. Have you ever lost your driver's license? YES ____ NO ____. If YES, give details:

_____

_____

_____

21. Cosigners and Debts Incurred for Other People:

A. Were there any cosigners for you on any of the debts you have listed in these forms?
YES _____ NO _____. If YES, give the cosigner's name and address, and which debts were cosigned:

B. Have you ever been the cosigner on someone else's loan or debt which hasn't been paid off?
YES _____ NO _____. If YES, list the following for each debt:

Creditor's Name and Address	*Date of Debt*	*Amount Owing*	*Name and Address of Person You Cosigned For*

C. Have you borrowed any money for someone else's benefit? YES _____ NO _____. If YES, list the following unless you are sure that loan or debt has been paid:

Creditor's Name and Address	*Collection Agent or Attorneys*	*Date of Debt and Which Spouse Owes*	*For What?*	*Current Amount of Claim*

D. If you put up any of your property as collateral on a debt you cosigned, list the following:

Creditor	*Type of Property*	*How Much the Property Is Worth Now*

22. Credit Card and Finance Company Debts:

A. Have you obtained cash advances of more than $750 in the last seventy days or used any credit card to purchase more than $500 worth of goods or services in the last ninety days? YES _____ NO _____. If YES, give details: _____

B. Have you ever gone over your credit limit on any credit cards? YES _____ NO _____. If YES, give details:_____

C. If any of your debts listed on this form are owed to finance companies, did you sign an agreement that listed some of your property (such as a second television or VCR) and stated that the property would be security or collateral for the loan? YES _____ NO _____. If YES, which ones? _____

D. Do you owe money on a payday loan, auto title loan, or for a check cashing service? YES ___ NO ___. If YES, give details: _____

23. Evictions:

A. Has your current landlord sued you or brought an eviction suit against you? YES ____ NO ____. If YES, state:

Case Name	*Case No.*	*Court's Name and Address*	*Reason for Suit or Eviction*	*Result of Case (Eviction Judgment?) or Date of Hearing*

B. Does your current landlord have an eviction judgment or order against you? YES ____ NO ____. If YES, and the eviction is based on your nonpayment of rent, list the following:

Regular Rent Payment (Specify Monthly, Weekly, Other)	*When Are Rent Payments Due?*	*Back Rent You Owe*

C. Is your landlord planning to bring an eviction suit against you? YES ____ NO ____. If YES, give details and state if your landlord is claiming that you have damaged the property or used illegal drugs on the property:

24. Secured Debts: (*Answer Every Question*). Do you owe any money for any property or goods which can be repossessed or foreclosed if you fail to make payments? YES ____ NO ____. Have you agreed with any creditor that it can take any of your possessions from you, such as your car or your furniture, if you don't keep up with your payments? YES ____ NO ____. Do you have any mortgages or liens on your property? YES _____ NO _____. For all these debts, give the following information, including the full name and address of the creditor AND the attorney or collection agency.

Names and Addresses of Creditor, Collection Agency, & Attorney	*Acct. No.*	*Date & Purpose of Debt*	*What Property Is Collateral or Subject to Lien?*	*Current Value of Property*	*Original Amount Owed*	*Current Balance*	*Monthly Payment, No. of Payments Behind & Date When Last Payment Due*	*Who Owes? (Which Spouse? Co-signers?)*

If the collateral is a home or a car, do you have insurance on the property? YES ____ NO ____.

Is any of the collateral located somewhere other than your home? YES ____ NO ____. If YES, describe: _____

Do you dispute any of these debts? YES ___ NO ___. If yes, which ones? _____

Do you have an FHA, FmHA (Rural Housing), or VA Mortgage? _____

25. Unsecured Debts: List all creditors, including creditors who have judgments or whose claims you dispute. Anyone who you think may have a claim against you must be listed even if the claim is old. ***For each debt, please give all information requested. If a collection agency or an attorney is involved, list it <u>and</u> the person or company you originally owed.***

Creditor's Name and Address	*Name and Address of Collection Agency and Attorney, If Any*	*Account No.*	*Date of Debt*	*What Is Debt For?*	*Current Amount of Claim*	*Which Spouse Owes?*	*Any Co-signers?*

Do you dispute any of these debts? YES ____ NO ____. If YES, which ones? _____

Now review all the debts you have listed on this page and the last. Have you forgotten any:

medical bills?	mail order bills?	schools?	condominium assessments?	utility or telephone bills?
credit card bills?	judgments?	student loans?	traffic tickets or parking tickets?	loans from relatives?
store charges?	loan companies?	welfare debts?	criminal restitution debts?	money owed to creditors who repossessed your property?
cable T.V. bills?	debts you cosigned?	back rent?	bills for goods or services?	
payday loans?	provided to your dependents?		bills owed to old landlords?	loans on your pension?

26. **Asset Listing:**

(If you are married and living with your spouse, designate any items listed below that are not jointly owned.)

A. REAL PROPERTY (Home):

(1) Do you own real estate that you use as your home? YES _____ NO _____. Describe and give the location of this property (house, mobile home, condominium, cooperative, land, etc.) in which you hold an interest:

_____

_____

_____

(2) Co-owners: _____

(3) Purchase price: _____ Date purchased: _____

(4) Original mortgage amount: _____ Downpayment amount: _____

(5) Have you used any funds that you did not borrow to purchase or improve your home? YES __ NO __. If YES, list the amounts and give details: _____

_____

(6) If not purchased, state when and how you became the owner (inheritance, gift, etc.): _____

(7) Present value of your house: _____

(8) Outstanding mortgage balance: _____

(9) Are there any other mortgages? YES ____ NO ____. If YES, give the name and address of each company:

_____

_____

(10) Is any mortgage insured by the FHA, VA, or a private mortgage insurance company?

YES ____ NO ____. If YES, give details: _____

_____

B. REAL PROPERTY (Other Real Estate):

(1) Do you own other real estate? YES _____ NO _____. Describe and give the location of all real property (lot, house, condominium, cooperative, land, burial plot, etc.) in which you hold an interest:

_____

_____

_____

(2) Co-owners: _____

(3) Outstanding mortgage balance: _____

(4) Name of mortgage company: _____

(5) Purchase price: _____ Year purchased: _____

(6) Present value of your house: _____

(7) Are there any other mortgages? YES __ NO __. If YES, give the name and address of each company:

_____

_____

(8) Is any mortgage insured by the FHA, VA, or a private mortgage insurance company?

YES ____ NO ____. If YES, give details: _____

_____

C. PERSONAL PROPERTY:

(1) Cash on hand: $_____

(2) Do you have any deposits of money in banks, savings and loan associations, or credit unions, or is your name listed on any other account in which someone else has deposits of money? If YES, for each account, list the name and address of the bank, savings and loan association, or credit union, the amount in the account, and the names of all persons listed on the account:

_____

_____

(3) Have you given a security deposit to any landlord, utility, or anyone else? YES ____ NO _____. If YES, list the name and address of the person or company and the amount:

_____

_____

(4) List your major property items such as stove, refrigerator, TV, sewing machine, furniture, guns, etc., giving approximate age and value (what you could get for it if you sold it). (These goods usually can be protected, but you must list them to protect them.)

Item	*Approximate Age*	*Value (What You Could Get for It If You Sold It)*

If any of the above items are being financed through a company, list the item and the name and address of the company below: _____

_____

_____

_____

(5) Give an estimate of the value (what you could get for it if you sold it) of the following:
All your furniture not already listed: $_____ All your clothing: $_____ All minor appliances not already listed: $_____ All your household goods not already listed (dishes, utensils, food, etc.): $_____

(6) List each item of jewelry that you own, and an estimate of its value (what you could get for it if you sold it):

_____

D. CARS, MOBILE HOMES, TRAILERS AND BOATS:

Do you have any cars, trucks, mobile homes, boats, trailers, or motorcycles? YES _____ NO _____. If YES, give the year, make, model, value, who is financing it, and amount owed:

E. OTHER PROPERTY:

Do you own any life insurance policies? YES _____ NO _____.

If YES, list insurance company's name and address:

How long have you had each policy?

Cash surrender value:

Do you have any other insurance, including credit insurance? YES _____ NO _____. If YES, describe:

Do you expect to receive any money from any insurance in the near future? YES _____ NO _____. If YES, give details:

Do you own any stocks? YES _____ NO _____. Value: $

Do you own any bonds (including U.S. Savings Bonds)? YES ____ NO ____. Value: $

Do you own any machinery, tools, or fixtures used in your business or work? YES ____ NO ____. If YES, list and state what you could sell it for:

Do you have any animals or pets? YES _____ NO _____. If YES, describe and give value (what you could sell them for):

Do you have any right to receive commissions or other payments from any previous job you have held? YES _____ NO _____. Does anyone owe you any money? YES _____ NO _____. If YES to either, state names, addresses and amounts owed:

Do you have any books, prints or pictures, stamps or coins, or sports equipment of substantial value? YES _____ NO _____. If YES, describe and estimate their value:

Do you have any stock in trade (inventory)? YES ____ NO ____. If YES, describe and estimate the value:

Do you own anything else not mentioned above? YES _____ NO _____. If YES, describe and state its value (what you could sell it for): _____

_____

Does any of the property that you own or possess pose a threat of harm to public health or safety?
YES _____ NO _____.
Is the threat imminent? YES _____ NO _____.
Has anyone ever alleged that any of the property that you own or possess poses a threat of imminent harm to public health or safety? YES _____ NO _____.
Was the threat alleged to be imminent? YES _____ NO _____.
Give details regarding any threat or alleged threat to public health or safety, including identification of property and nature of potential harm or alleged harm. _____

_____

_____

_____

27. Budget Information:

A. Do you currently receive your pay or other income (check one):

	YOU	YOUR SPOUSE
WEEKLY	_____	_____
EVERY 2 WEEKS	_____	_____
MONTHLY	_____	_____
OTHER	_____	_____

B. What is the gross amount received in wages or other income (before taxes or other deductions)?

YOU	YOUR SPOUSE
_____	_____

C. What deductions, if any, are taken out?

	YOU	YOUR SPOUSE
Taxes	_____	_____
Insurance	_____	_____
Union dues	_____	_____
Other (identify: _____)	_____	_____

D. What is the usual amount of your check (take-home pay)?

YOU	YOUR SPOUSE
_____	_____

E. Is your job subject to seasonal or other changes?

YOU	YES _____	NO _____
YOUR SPOUSE	YES _____	NO _____

F. What was your gross income (reported on W-2 form and tax return) for last year?

YOU	YOUR SPOUSE
_____	_____

G. If you receive alimony, maintenance, or support, what is the amount you get on a regular basis?

YOU	YOUR SPOUSE
_____	_____

H. List all dependents of you and your spouse.

	NAME	AGE	RELATIONSHIP
YOU			
YOUR SPOUSE			

I. List all members of your household.

NAME	AGE	RELATIONSHIP

J. Do you expect your income to increase or decrease in the next year? YES ____ NO _____. If YES, describe:

_____

K. Do you expect to have any increase or decrease in expenses (like medical bills) in the near future? YES____ NO_____. If YES, describe: _____

_____

_____

L. Do you, your spouse, or your dependents receive income from any source other than jobs, alimony, maintenance, or support listed above (such as public assistance, unemployment compensation, social security, SSI, pension, etc.)? YES _____ NO _____. If YES, list:

Source of Income	*To Whom Payable*	*Amount per Month*

M. Do you, your spouse, or your dependents receive any regular contributions to your household expenses from any source not listed above? YES _____ NO _____. If YES, list:

Source of Contribution	*To Whom Payable*	*Amount per Month*

N. Is your family eligible for food stamps? YES _____ NO _____.
If YES, how much in food stamps do you receive per month? $_____

O. Expenses. (Give realistic estimates. If your expenses add up to more than the income you have listed, or less than your income, be prepared to explain why.)

List below your average monthly expenses for you and your family. If you pay any of these expenses weekly, bi-weekly, quarterly, semi-annually, or annually, you will need to adjust the amount to show it as a monthly amount (for example, if you pay the expense weekly, you can show that as a monthly expense by multiplying the weekly amount by 4.3). If you are not sure how to do this, let us know of any expenses you do not pay monthly.

	Average Monthly Expenses	*List Any Increase or Decrease You Expect for Item in Next Year*
Rent or mortgage	$ _____	_____
Are real estate taxes included? ___		
Is property tax included? ___		
Condo or homeowners association fees	$ _____	_____
Trash pickup	$ _____	_____
Electricity	$ _____	_____
Heat	$ _____	_____
Water	$ _____	_____
Telephone		
Home	$ _____	_____
Cell	$ _____	_____
Other utilities		
Internet	$ _____	_____
Cable T.V.	$ _____	_____
Other	$ _____	_____
Personal care (haircuts, etc.)	$ _____	_____
Home maintenance (repairs and upkeep)	$ _____	_____
Food (cash you spend on food)	$ _____	_____
Amount of food stamps you spend	$ _____	_____
Clothing	$ _____	_____
Laundry and cleaning	$ _____	_____
Medications	$ _____	_____
Other medical and dental expenses (co-pays, eye care, etc.)	$ _____	_____
Public transportation	$ _____	_____
Auto maintenance (repairs and upkeep)	$ _____	_____
Auto registration and license fees	$ _____	_____

Gasoline and oil	$ _____	_____
Newspapers, magazines, school books	$ _____	_____
Recreation	$ _____	_____
Charitable contributions	$ _____	_____
Club and union dues		
(not deducted from wages)	$ _____	_____
Insurance (not deducted from wages)		
Homeowner's or renter's	$ _____	_____
Life	$ _____	_____
Health	$ _____	_____
Auto	$ _____	_____
Other _____	$ _____	_____
Taxes (not deducted from wages		
or included in mortgage payment)	$ _____	_____
Tax return preparation fees	$ _____	_____
Checking account and other bank fees	$ _____	_____
Loan installment payments		
Auto	$ _____	_____
Other _____	$ _____	_____
Other _____	$ _____	_____
Alimony, maintenance or support payments	$ _____	_____
Child support and other payments for		
support of dependents	$ _____	_____
Expenses for operating your business	$ _____	_____
Other expenses (list types of expenses, e.g.,		
cigarettes, diapers, security system, school,		
birthday and holiday gifts, pets)		
Identify: _____	$ _____	_____
_____	$ _____	_____
_____	$ _____	_____

P. If you and your spouse are not filing bankruptcy together, does your spouse (who is not filing bankruptcy) have any monthly expenses listed above that are not paid towards your household expenses (such as child support payments your spouse makes to a former spouse or payments your spouse makes on separate debts)? YES _____ NO _____.
If YES, list:

Describe Expense Item	*To Whom Payable*	*Amount per Month*

Q. Do you have any monthly expenses not listed above that you pay for the care and support of an elderly, chronically ill, or disabled member of your household or your immediate family? YES____ NO_____.
If YES, describe: _____

R. Do you have any monthly expenses not listed above that you pay to keep your family safe from domestic violence? YES____ NO_____. If YES, describe: _____

_____

_____

S. Do you pay any expenses for your dependent children under the age of eighteen to attend a private or public elementary or secondary school? YES____ NO_____. If YES, describe: _____

_____

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ETHICAL IMPLICATIONS OF LIMITING REPRESENTATION TO MITIGATE ATTORNEYS' FEES

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Another current issue raising ethical concerns is whether attorneys should be able to "unbundle" or otherwise limit the scope of their representation in order to mitigate attorneys' fees. This isn't an issue isolated to bankruptcy – however, the focus of this memorandum is limited to examples in the bankruptcy context.

One bankruptcy court addressing such a situation said: "While an attorney may limit the scope of representation, 'a practice colloquially referred to as 'unbundling' ... [such limitation must be] consistent with the rules of ethics and professional responsibility binding on all attorneys.'" *In re Ortiz*, 496 B.R. 144, 148–49 (Bankr. S.D. N.Y. 2013) (quoting *In re Seare,* 493 B.R. 158, 176 (Bankr. D. Nev. 2013) (alterations in original)).

Illustrative Cases:

In re Seare, 493 B.R. 158 (Bankr. D. Nev. 2013), *aff'd*, 515 B.R. 599 (B.A.P. 9th Cir. 2014)

Holding: The decision to unbundle must be reasonable under the circumstances and counsel may not use boilerplate forms unbundling services if those excluded are reasonably necessary to achieve a particular client's objectives. The court found that counsel's "mill" system of processing cases with blind adherence resulted in violation of Rules of Professional Conduct (Nevada) as well as 11 U.S.C. §§ 526, 528, and 707(b)(4)(c). The court imposed sanctions including (i) "total" disgorgement of all fees paid in the case, including prepetition fees; (ii) reprimand in the form of official publication of the court's opinion; (iii) directing counsel to complete 15 hours of continuing legal education, 10 of which were to be on the topic of "ethical responsibilities to clients;" and (iv) requiring counsel, for a period of two years, to provide a copy of the court's opinion to every client "who is sued in an adversary proceeding, but only if [counsel] declines to represent them in that adversary proceeding for any reason." The court's decision and the sanctions imposed were upheld on appeal.

In re Castorena, 270 B.R. 504, 523 (Bankr. D. Idaho 2001)

Holding: The court noted that debtors may utilize one of three options to pursue bankruptcy relief: (1) appearing *pro se*; (2) using services of petition preparer; and (3) retaining a licensed lawyer to represent them. Reviewing §§ 327 to 330 of the Bankruptcy Code and the Rules of Professional Conduct (Illinois), the court found that the only way "unbundling" or limitation of representation is proper is when the debtor provides informed consent. Because counsel failed to act properly by providing reasonable representation, among other failures, the court ordered a reduction in compensation and disgorgement in each of the 19 Chapter 7 cases that were examined in the opinion.

In re Bancroft, 204 B.R. 548 (Bankr. C.D. Ill. 1997)

Holding: Guided by §§ 110 and 327 to 330 of the Bankruptcy Code, the court concluded that there is a minimum level of services required to claim a professional fee; however, the court also recognized that the "more difficult questions are what are the minimum services required to claim a fee, may they be waived, and if so, on what basis." The relevant Rules of Professional Conduct (Illinois) permitted limited representation but only with a client's informed consent, defined by the court as a "clear understanding" of the risks and hazards as well as the possible results related to navigating the bankruptcy process without representation. As to each of the 5 Chapter 7 cases that were examined, the court ordered the return of compensation paid to the attorney back to the debtors because the services provided were nothing more than services of a bankruptcy petition preparer.

In re Pair, 77 B.R. 976 (Bankr. N.D. Ga. 1987)

Holding: Presented with similar motions to review the debtor's counsel fees in five Chapter 13 cases, the court found that counsel owed a duty to the debtors to represent them despite their failure to pay additional fees related to representation at hearings. The court held that without discharge or authorization from the court to withdraw, counsel's failure to appear at hearings warranted imposition of sanctions.

Faculty

Hon. Roberta A. Colton is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, appointed on April 1, 2016. She has an extensive background in bankruptcy mediation dating back to the early 1990s, when she worked with the Middle District of Florida to develop a pilot program that included mediation rules, training and qualifications for bankruptcy mediators. In 1992, Judge Colton presented a program on mediation in bankruptcy at the National Conference of Bankruptcy Judges and the following year co-authored "Confidentiality Issues in Bankruptcy Mediation," which was published in the *Norton Bankruptcy Advisor*. While in private practice, Judge Colton mediated numerous complex and noncomplex bankruptcy and commercial disputes. Upon taking the bench, she continued bankruptcy mediations and now conducts judicial mediations for cases pending before her colleagues on the bench. In September 2016, she served as an instructor at the Federal Judicial Center's Judicial Mediation Workshop. Before coming on the bench, Judge Colton practiced at Trenam Law in Tampa, Fla., for 33 years. Her practice included business reorganization, bankruptcy litigation, foreclosure/lender liability, creditors' committees, bankruptcy trustee representation, commercial litigation and bankruptcy asset sales. Prior to joining Trenam Law, she served as a judicial law clerk for Hon. James C. Hill of the U.S. Court of Appeals for the Eleventh Circuit. Judge Colton has served on the Board of Regents for the American College of Bankruptcy and as chair of the Local Rules Committee for the U.S. Bankruptcy Court for the Middle District of Florida. She was the former chair of the Florida Bar Business Law Section, Bankruptcy/UCC Committee, and the Tampa Bay Bankruptcy Bar Association. She currently co-chairs the Judicial Liaison Committee for the Florida Bar's Business Law Section. Judge Colton received her B.A. in commerce with distinction from the University of Virginia in 1979 and her J.D. from William & Mary Law School in 1982, where she served on its law review and was a national moot court finalist.

Prof. Roberta K. Flowers is a professor of law at Stetson University College of Law in Gulfport, Fla. She also is the director of the Center for Excellence in Elder Law and the director of the LLM in Elder Law. Prof. Flowers teaches ethics in an elder law practice in the Elder Law LL.M. program. She also teaches evidence, criminal procedure and professional responsibility. Prof. Flowers has served as the director of the Center for Excellence in Advocacy Center and as the William Reece Smith, Jr. Distinguished Professor in Professionalism. She is currently the vice president of NAELA (National Academy of Elder Law Attorneys). Prof. Flowers has lectured throughout the U.S. and internationally in the area of ethics. She co- created a set of videos depicting ethical dilemmas faced by elder law attorneys, which have been used throughout the U.S. to train attorneys. The Florida Supreme Court awarded Pher with the Florida Supreme Court Professionalism Award for her work on these videos. Additionally, she co-designed the first "elder-friendly courtroom" in the nation, a model of the important considerations that should be made when creating courtrooms of the future. Prof. Flowers began her career in 1984 as a deputy district attorney for the 18th Judicial District of Colorado, where she served as a trial attorney in the criminal division. In 1989, she was appointed assistant U.S. attorney for the Southern District of Florida, where she served in the Appellate Division, the Major Crimes Unit and the Public Corruption Unit. Prof. Flowers's articles have appeared in such journals as the *Fordham Law Review*, the *Boston College Law Review*, *Missouri Law Review*, the *Nebraska Law Review*, the *Ohio State Journal of Criminal Law*, *Hastings Constitutional Law Quarterly*, the *Stetson Law Review* and the *NAELA Journal*. She received her Bachelor's degree

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Loretta C. O'Keeffe is an attorney with Gibbons | Neuman in Tampa, Fla., where her practice focuses on commercial litigation, creditors' rights and real estate litigation, including disputes involving contracts, foreclosures, title insurance and collections. She is a member of the Florida Bar and is admitted to practice before the U.S. District Court for the Middle and Southern Districts of Florida as well as the U.S. Court of Appeals for the Eleventh Circuit. Ms. O'Keeffe currently serves as board member and mentoring co-chair for the C.H. Ferguson-M.E. White American Inn of Court, board member and treasurer for St. Michael's Legal Center for Women and Children, and secretary of the Tampa Bay Catholic Lawyers Guild. She served on The Florida Bar's Grievance Committee, the Professional Ethics Committee of The Florida Bar and the Leadership Institute for the Hillsborough County Bar Association, and she was president of the Young Men's Service League South Tampa, a national mother-and-son service organization. Ms. O'Keeffe is a member of the Tampa Bay Bankruptcy Bar Association, the Hillsborough County Bar Association, ABI, the Tampa Bay Lawyers Chapter of the Federalist Society, the Propeller Club of Port Tampa, the South Tampa Chamber of Commerce and the Krewe of Iris in New Orleans. She received her undergraduate degree from Loyola University College of Business in New Orleans and her J.D. from Stetson University College of Law in St. Petersburg, Fla.

Edmund S. Whitson III is a partner with Adams & Reese LLP in Tampa, Fla., and has advised clients throughout the U.S. on complex litigation matters in state, district and bankruptcy courts. He is familiar with the needs of financial institutions with regard to loan document enforcement and restructuring and bankruptcy, and he has experience representing banks, receivers and financial institutions in matters involving asset recovery, asset sales and fraudulent-transfer litigation. Mr. Whitson has also worked extensively with insurance company and private-equity group clients in this area. He represents companies in sophisticated collection/garnishment and judgment-recovery litigation and is experienced in creditors' rights, landlord-tenant, commercial lending, and real estate lending and development issues. His experience includes counseling clients in contract negotiation and preparing legal opinions in connection with nonconsolidation and other credit transactions and Transportation Infrastructure Finance and Innovation Act financings. In addition, Mr. Whitson has represented a variety of clients, including large hospitals, physician groups and other health care providers in mergers, acquisitions and affiliation transactions. He received his B.S. from the University of Virginia, McIntire School of Commerce and his J.D. with honors from the University of Florida Frederic G. Levin College of Law.