Ethics and Civility in Bankruptcy Practice

Richard M. Meth, Moderator
Fox Rothschild LLP; Roseland, N.J.

Edward J. Nazar
Hinkle Law Firm LLC; Wichita, Kan.

Andrea B. Schwartz
Office of U.S. Trustee; New York

Hon. Elizabeth S. Stong
U.S. Bankruptcy Court (E.D.N.Y.); Brooklyn

Ethics & Civility in Bankruptcy Practice

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U.S. Bankruptcy Court (E.D.N.Y.)

Brooklyn, New York

Edward J. Nazar

Hinkle Law Firm LLC

Wichita, Kansas

Andrea B. Schwartz

Office of the United States Trustee

New York, New York

Richard M. Meth – Moderator

Fox Rothschild LLP

Roseland, New Jersey

THE PANELISTS

Hon. Elizabeth S. Stong
United States Bankruptcy Judge
Eastern District of New York
Brooklyn, New York

Edward J. Nazar
Hinkle Law Firm LLC
Wichita, Kansas

Andrea B. Schwartz
Office of the United States Trustee
Region 2 – New York, New York

MODERATOR

Richard M. Meth
Fox Rothschild LLP
Roseland, New Jersey

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An Overview as to Ethics & Civility
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Introduction

Civility and ethics continue to be areas in which practitioners can always improve. While much of the practice of law is carried out professionally, case law unfortunately continues to highlight examples of poor and unprofessional conduct, mostly by "bad" lawyers.[1]

The materials that follow highlight particular issues of civility and ethics as they arise during the course of a bankruptcy case. This text uses fact scenarios, from actual case law, to focus on both the bad conduct of various actors and the various remedies available to the bankruptcy court.

While the Rules of Professional Conduct do not give us detailed guidance on how to deal with every possible scenario that might arise, it is clear that the

[1] "By "bad," we mean lawyers who behave in ways that subvert the legal system; lawyers who are malicious for the sake of maliciousness. Lawyers are not supposed to, among other things, torment third parties. See Model Rules of Prof'l Conduct R. 4.4 (2009) (stating that a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person). In addition, lawyers should not lie to the opposing side or obstruct its access to evidence. See Model Rules of Prof'l Conduct R. 3.4 (2009) (stating that a lawyer shall not unlawfully obstruct another party's access to evidence and shall not falsify evidence or assist a witness to testify falsely). Also, lawyers should not lie to the court. See Model Rules of Prof'l Conduct R. 3.3 (2009) (stating that a lawyer shall not make a false statement of fact or law to a tribunal). Finally, lawyers should not behave dishonestly. See Model Rules of Prof'l Conduct R. 8.4 (2009) (stating that it's professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation)."

Rapoport, Nancy B., "Through Gritted Teeth and Clenched Jaw: Court-Initiated Sanctions Opinions in Bankruptcy Courts", 41 St. Mary's L.J. 701 (2010), footnote 1.

interaction of opposing counsel, and of parties in interest, when governed by principles of candor, fairness, and respect, will help to create a professional environment.

Selected "ABA Model Rules of Professional Conduct"

Advocate

Rule 3.3: Candor Toward the Tribunal

Rule 3.4: Fairness to Opposing Party and Counsel

Rule 3.5: Impartiality and Decorum of the Tribunal

Transactions with Persons Other Than Clients

Rule 4.4: Respect for Rights of Third Persons

Maintaining the Integrity of the Profession

Rule 8.4: Misconduct

I. Fairness to Opposing Party and Counsel

A lawyer's role as advocate does not require a loss of civility. In fact, the Rules of Professional Conduct tell us that we have a duty to treat opposing counsel with fairness. For example, comment 1 to Rule 3.4 of the North Carolina Rules of Professional Conduct states:

> The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

The following case illustrates abusive actions by counsel and a bankruptcy court's reaction to these unfair tactics.

A. *In re Delfino*, 351 B.R. 786 (Bankr. S.D. Fla. 2006)

Facts: Debtor filed a Chapter 7 case on December 18, 1998. The case proceeded in the normal course, and a discharge order was entered on April 15, 1999. Seven years after the discharge order, the Debtor moved to reopen the case to add an omitted creditor. Debtor's counsel engaged in what the Court termed "the kind of obnoxious behavior that has come to give lawyers a bad name." This behavior included refusing to give opposing counsel a fax number, and instead requiring opposing counsel to read the terms of proposed orders over the telephone; refusing to speak with opposing counsel; and refusing to consent to a continuance when opposing counsel was scheduled to be out of the country.

The Court's Sanction: The Court found cause based on the inequitable conduct of counsel, along with a theory of laches, to deny the relief requested by the Debtor. In doing so, Judge Olson specifically stated:

> After observing [Debtor's counsel's] behavior, candor and demeanor on the witness stand and at counsel table, I can only characterize his professional conduct as abhorrent, gratuitously nasty, and thoroughly unprofessional. He is, in short, a lawyer for whom professionalism is an alien concept.

See Delfino, 351 B.R. at 788.

II. Candor toward the Tribunal

Candor to the tribunal reflects the duty that lawyers owe to the Court. For example, Rule 4-3.3 of the Florida Rules of Professional Conduct states in part:

> RULE 4-3.3 CANDOR TOWARD THE TRIBUNAL
>
> (a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (4) offer evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

See Florida R.P.C. 4-3.3. The case below exemplifies some of the possible effects of making a false statement in communication with a court.

A. *In re U.S. Capital*, Case No. 14-32819-JKO (Bankr. S.D. Fla. 2014)

Facts: Creditor filed a motion for relief from stay on October 17, 2014. The motion was heard by the Court on October 30, 2014. The Court ruled that the motion for stay relief would be rolled to the November 25, 2014 calendar and that the automatic stay would remain in effect. The Court directed Debtor's counsel to upload the order. On November 3, 2014, Creditor's counsel uploaded a purportedly agreed order granting the motion for relief from stay. However, the order uploaded by Creditor's counsel was not agreed upon. Furthermore, the ruling in the uploaded order was exactly contrary to the Court's oral ruling at the October 30, 2014 hearing. In response, the Court entered an order to show cause why counsel for [creditor] should not be sanctioned for improper conduct and have certain *pro hac vice* admissions revoked.

The Court's Sanction: After a show cause hearing, the Court entered an interim sanctions order finding that

> [counsel] is hereby suspended from the practice of law in the United States Bankruptcy Court for the Southern District of Florida. She may reapply for admission to practice, or for the lifting of this suspension, anytime after April 30, 2015 upon a showing of rehabilitation which shall include proof that she has attended no less than 30 hours of continuing legal education ("CLE") in professional ethics and/or professional responsibility. Such CLE training hours are to be completed in person.

See [ECF 208]. After a showing of rehabilitation, a final order was entered on March 23, 2015 [ECF 293] and the sanction was lifted, by order [ECF 391], on September 24, 2015.

III. Impartiality and Decorum of the Tribunal

Decorum in the courtroom is measured in many ways – the words we pick, the tone we choose, and the general attitude with which we present ourselves. As attorneys, it is our duty to conduct ourselves professionally in advocating for our clients. The Commentary to Florida Bar Rule of Professional Conduct 4-3.5 states:

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

See Commentary, Florida R.P.C. 4-3.5. It is this duty to "refrain from abusive or obstreperous conduct" that Judge Isicoff cites in the following case, which involved an Order to Show Cause entered in 2007.

A. *Goldberg v. Mount Sinai Center*, Adv. No. 07-01210-LMI (Bankr. S.D. Fla. 2007)

Facts: During a Chapter 11 hearing, a lawyer suggested to the Judge that "with respect, your honor, [] you're a few french fries short of a Happy Meal in terms of what's likely to take place." In response, Judge Isicoff issued an order to show cause why the visiting attorney should not be suspended from the court or why his *pro hac vice* status should not be revoked. Specifically, the show cause order stated:

> [Counsel] shall appear before this court to show cause why he should not be suspended from practice before this court, including the revocation of his pro hac vice admission in this matter for conduct that appears to be inconsistent with the requirements for professional conduct by which [the attorney] agreed to be governed when he sought permission to appear before this court.

The Court's Sanction: Prior to the show cause hearing, the offending attorney revealed to the court that he would be voluntarily stepping down as head of his firm's bankruptcy practice. Moreover, the attorney would be offering 200 hours of pro bono work in his home jurisdiction. Judge Isicoff additionally ordered that the attorney take a CLE professionalism course. The Court further commented:

> There is no jurisdiction in the U.S. – including the district where [the attorney] regularly practices – where the expression and tone [] used . . . would fall in the bounds of acceptable behavior.

Id. at [ECF 47]. Judge Isicoff, in admonishing the attorney, also cited to Rule 4-3.5 of the Florida Bar Rules – Impartiality and Decorum of the Tribunal. The Court noted that the comments to this section observe that "refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants."

IV. Respect for Rights of Third Persons

A. *Arnold et al. v. Cargill Inc.*, 2004 WL 2203410 (D. Minn. 2004)

Facts: Plaintiffs filed an employment discrimination lawsuit (the "lawsuit") against Cargill Incorporated ("Cargill"). The law firm of Sprenger & Lang ("S & L") represented the Plaintiffs. Ray Douglas ("Douglas") worked for Cargill for 22 years and routinely, during his tenure, worked with both Cargill's in-house law department and Cargill's outside counsel. In July of 2000, S & L approached Douglas for the purpose of obtaining information related to the lawsuit. S & L aggressively pursued documents in Douglas's possession, and the record reflected no evidence, other than S & L's declaration, that anyone at S & L ever explained to Douglas that privileged

documents were to be excluded. In fact, "Douglas testified that he asked S & L what to do with documents marked privileged and confidential and was told to send them all over to S & L and told that they would go through them." *See Cargill Inc.* at 8.

The Court's Sanction: The Court found that S & L made no meaningful effort to protect Cargill's confidences and that S & L eventually came into possession of documents marked privileged and confidential. Accordingly, the Court found that S & L violated Cargill's confidentiality rights as prohibited by Rule 4.4. As a result of this and other ethical breaches, the Court granted Cargill's Motion to Disqualify S & L.

V. Misconduct

The Rules of Professional Conduct governing attorneys broadly instruct counsel not to behave in a manner that is unbecoming or unprofessional. For example, New York Rule of Professional Conduct 8.4 states in part:

> A lawyer shall not:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
>
> . . .
>
> (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

See New York R.P.C. 8.4. While there may be some grey area between zealous advocacy and sanctionable, bad faith pleadings, some fact patterns are clear.

A. *In re Khan,* 488 B.R. 515 (Bankr. E.D.N.Y. 2013), *affirmed by Dahiya v. Kramer*, 2014 WL 1278131 (E.D.N.Y. 2014), *affirmed by In re Khan*, 593 Fed.Appx. 83 (2nd Cir. 2015).

Facts: The Debtor filed a Chapter 7 bankruptcy case on July 22, 2010 and received her discharge five months later, on December 23, 2010. On that same day, the Trustee filed a notice of discovery of assets. *See Khan,* 488 B.R. at 522. On December 3, 2011, the Trustee filed an adversary proceeding against the Debtor's son (the "Son") for various claims related to the sale of real property. The Son hired counsel who filed a series of counterclaims in response to Trustee's complaint. In the Son's first counterclaim, for abuse of process, his counsel argued

that the Trustee "acted deliberately, maliciously, oppressively, and with callous and intentional disregard of their duties." *See id.* at 523. The Son's second counterclaim, for "constitutional torts," stated that the Trustee has "deliberately hurt[] the family composition here" by "su[ing] the son defendant on behalf of the mother debtor." *See id.* Furthermore, counsel stated that injunctive relief would "check the abuse perpetrated by the trustees in this district" that arises when family members are "pitted against each other" and "have no financial capacity to engage legal help." *See id.* In response, the Trustee filed a motion for sanctions pursuant to 28 U.S.C. Section 1927 and Bankruptcy Code Section 105.

The Court's Sanction: Judge Stong found that the Court possessed the authority to sanction the conduct of the Son's counsel pursuant to Section 1927 and the inherent powers of the court. In doing so, Judge Stong stated:

> A professional owes a duty to clients, colleagues at the bar, and the courts not to let passion or policy concerns overwhelm professional judgment….When the attorney's conduct crosses the line that divides creative and zealous advocacy from the assertion of claims that are plainly without merit in order to pursue a personal agenda, the question of bad faith must be addressed.

See Khan, 488 B.R. at 534. Ultimately, the Court concluded that "the objectives of compensation and deterrence [were] appropriately balanced and reflected in an award of sanctions against [the Son's counsel] in the amount of $15,000." *Id.* at 537.

VI. Mean-Spirited Litigation

A. Horton v. Maersk Line, Ltd., 294 F.R.D. 690 (S.D. Ga. 2013)

Facts: A longshoreman (the "Plaintiff") sued Maersk Line, Ltd. (the "Defendant") for negligence after injuring himself unloading a ship. Plaintiff's counsel deposed another longshoreman who had been working near the Plaintiff at the time of the incident. The deposition was "laden with a continuous stream of snarky accusatory questions and innuendos from [Plaintiff's counsel]. *See Horton*, 294 F.R.D. at 693. The Defendant moved for a protective order after emphasizing that Plaintiff's counsel had "engaged in bullying and belittling [the witness] with threats of contempt and criminal prosecution as well as insults to his integrity, his character, and his education." Plaintiff's counsel included the following statements in his deposition:

> Would you like to call your father-in-law or something as to whether you need a criminal lawyer?

> You're going to do what I say or I'll go to the judge and hold you in contempt. How about that?
>
> Tell the district attorney in this deposition . . . why he shouldn't indict you for perjury.

See id. at 693-94.

The Court's Remedy: Here, the Court granted both forms of relief requested in the Defendant's motion – (1) exclusion of the deposition testimony, and (2) a bar order enjoining further unprofessional conduct in future depositions. *See Horton*, 294 F.R.D. at 698-99. Specifically, the Court imposed the following restrictions:

> No threats or attempt to intimidate [the witness] in any manner, including but not limited to, threatening him with prosecution for perjury.
>
> No question shall contain an opinion or narrative about what is fair to [the Plaintiff], much less what a wonderful person (family man, etc.) he is.
>
> [The witness] shall otherwise be shown respect. Questioning shall be free of insults and comments about his educational background, his employment, his parents, or any other aspect of his life.
>
> This second [] deposition shall be at the expense of all attending parties, but it shall also be videotaped, and that extra (videotaping) expense shall be absorbed by [Plaintiff's counsel] personally, not his client.

See Horton, 294 F.R.D. at 699.

The Court noted in its opinion that "[Plaintiff's counsel] unquestionably frustrated the fair examination of the witness with a barrage of arrogant, irrelevant, accusatory questions and caustic comments that no witness, let alone a young man with no legal training, should have to endure." *See Horton*, 294 F.R.D. at 697. Furthermore, the Court stated that "if a lawyer violates ethical and professional norms in deposing a witness . . . ample public policy grounds exist to give standing to a party, whose claims or defenses may well be adversely impacted as a result, to object to unprofessional if not abusive deposition questioning of another." *See id.* at 697-98.

B. *Bedoya v. Aventura Limousine & Transp. Serv. Inc.*, 861 F. Supp. 2d 1346 (S.D. Fla. 2012).

Facts: Plaintiff filed a class action complaint on behalf of himself and other employees against the Defendants, a limousine company. The Complaint alleged violations of the Fair Labor Standards Act. During the course of the litigation, Plaintiff's counsel wrote an e-mail to opposing counsel containing aggressive, unprofessional language, such as:

"If you want to play in the sandbox with trial lawyers, you are going to do it the right way or we are going to call you out to the judge—every time."

"No more complaining about how much work you have to do. Nobody on this side of the internet cares."

See id. at 1369. Further, Defendants testified that during a deposition Plaintiff's counsel drew pictures of male genitalia to describe opposing counsel and occupied his time by playing the game Angry Birds on his phone. *See id.* at 1370.

The Court's Remedy: As a result of a variety of bad conduct on the part of Plaintiff's counsel, the Court disqualified Plaintiff's counsel from the matter and relieved him of all further responsibilities related to the Plaintiff in the proceedings. *See id.* at 1373.

Conclusion

The Rules of Professional Conduct provide a strong framework regarding professionalism and ethics. The Rules, their commentary, case law, and numerous law review and other scholarly articles provide extensive information on how lawyers should act in a given situation. However, the old adage is true – "All I really need to know I learned in kindergarten. Be respectful. Be fair. Do good."

"SIN AND PENANCE": WHEN CIVILITY IN THE PRACTICE GOES AWRY

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> "A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow must conform to both standards." *In Re Sawyer*, 360 U.S. 622, 646, 79 S.Ct. 1376 (1959); *Justice Stewart* concurring.

> "The dignity, decorum and courtesy that have traditionally characterized the courts and the legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice." *Ahanchian v. Xenon Pictures, Inc.,* 624 F.3d 1253, 1263 (9th Cir. 2010).

Civility has been defined as the notions of reciprocity and mutual respect to others.[1] *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223 n.2 (9th Cir. 2000) ("at the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values.")

But what happens when civility goes awry? What remedies are available for the court to discipline or sanction the offending party?

AUTHORITY TO SANCTION

The bankruptcy court's power to sanction comes from three general sources:

1. The inherent authority of federal courts;
2. Statutory authority granted by the Bankruptcy Code (11 U.S.C. §105) and 28 U.S.C. §1927; and
3. Procedural authority granted under the Federal Rules of Bankruptcy Procedure – Rule 9011, Rule 9020, and Rule 7037.

INHERENT AUTHORITY

Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-66, 100 S.Ct. 2455 (1980) ("[I]n narrowly defined circumstances, federal courts have inherent power to assess attorney's fees against counsel. The general rule is that a litigant cannot recover his counsel fees, but that rule does

[1] Amy R. Mashburn, *Making Civility Democratic*, 47 Hous. L. Rev. 1147, 1217 (2011). *See also* Robert B. Pippin, *The Persistence of Subjectivity* 228 (2005).

not apply when the opposing party has acted in bad faith, including bad faith in the conduct of the litigation. In view of a court's powers over the members of its bar, if it may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abused judicial processes.") *Syl. #3*

In Re Yorkshire, LLC, 2008 WL 3306680, at *3 (5th Cir. Aug. 8, 2008) ("[I]t is well-settled that a federal court, acting under its inherent authority, may impose sanctions against litigants or lawyers appearing before the court so long as the court makes a specific finding that they engaged in bad faith conduct.")

In Re MPM Enterprises, 231 B.R. 500, 504 (E.D.N.Y. 1999) ("[A] bankruptcy court is a federal court… [and] has the inherent power to control admissions to its bar and to discipline attorneys who appear before it.")

A request for sanctions arising out of an attorney's conduct in a core proceeding is itself a core proceeding. *See In Re Khan*, 48 B.R. 515 (E.D.N.Y. 2013) (Stong, J.), *aff'd Kramer v. Mahia* (*In Re Kahn*) 2013 U.S. Dist. LEXIS 55728 (E.D. N.Y. April 15, 2013), *aff'd Kramer v. Mahia* (*In Re Kahn*) (567 F. App'x 53 2d Cir. 2014) and cases cited therein.

AUTHORITY PER STATUTES AND RULES

Bankruptcy courts have statutory power to sanction participants under 11 U.S.C. §105(a) and 11 U.S.C. §707(b)(4)(A):

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

In addition, 11 U.S.C. §707(b)(4)(B) decrees that the court can assess "an appropriate civil penalty against the attorney of the debtor…," if it finds that the attorney violated rule 9011.

See In Re Yehud-Monosson USA, Inc., 472 B.R. 795 (D. Minn. 2012):

> "Rule 9011 (or Rule 11) sanctions are not the same as contempt sanctions and do not require the same procedures. *See*, *eg., Donaldson v. Clark*, 819 F.2d 1551, 1558-59 (11th Cir. 1987) (nothing in the text of Rule 11 or in the Advisory Committee Note indicates that due process require a court to follow the procedures called for by Fed. R. Crim. P. 42(b) for criminal contempt proceedings before it can impose a monetary sanction pursuant to Rule 11. Both the note and policy considerations tend to the opposite conclusion…. A violation of Rule 11 is fundamentally different from an infraction of criminal contempt and therefore warrants different sanction proceedings)." (472 B.R. at 802-803).

See also In Re Horsfall, 2011 WL 5865454 (Bankr. W.D. Wis. Nov. 17, 2011) (courts have noted that the purpose of sanctions under Rule 9011 "is to discourage unnecessary filings, prevent the assertion of frivolous proceedings and require good faith filings." [citation omitted] The Rule is not intended to function as a fee shifting statute which requires the losing party to pay costs. [citation omitted] Thus, the Rule focuses on the conduct of the parties and not on the results of litigation.) (at *3).

In *In Re Thomas*, 397 B.R. 545 (10th Cir. BAP 2008) (unpublished disposition), the court determined that it may *sua sponte* impose sanctions for conduct abusive of the judicial system under its inherent authority under 11 U.S.C. §105(a).

Rule 37(b) of the F.R.C.P., incorporated by reference in Rule 7037 of the F.R.B.P., deals with the failure to comply with a court order. If a court where discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. Other sanctions include:

1. Directing the matters embraced in an order or other designated facts be taken as established for purpose of the action as the prevailing party claims;
2. Prohibiting a disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
3. Striking pleadings in whole or in part;
4. Staying further proceedings until the order is obeyed;
5. Dismissing the action or proceeding in whole or in part;
6. Rendering a default judgment against the disobedient party;
7. Treating as contempt of court the failure to obey any court order except an order to submit to a physical or mental examination;
8. Requiring payment of reasonable expenses, including attorneys' fees, caused by the failure to produce; or
9. Informing the jury of the party's failure to produce.

The bankruptcy court has authority to sanction a party under 11 U.S.C. §105 or Bankruptcy Rule 9011, Rule 7037 or Rule 9020.

See In Re Kahn, 488 B.R. 515 (Bankr. E.D.N.Y. 2013) (Stong, J.); *In Re Ambotiene*, 316 B.R. 25, 34 (Bankr. E.D.N.Y. 2004), *aff'd Grand Street Realty, LLC v. McCord*, 2005 WL 2436214 (E.D.N.Y. Sept. 30, 2005).

In *In Re Ambotiene*, 316 B.R. 25, 34 (Bankr. E.D.N.Y. 2004), *aff'd Grand Street Realty, LLC v. McCord*, 2005 WL 2436214 (E.D.N.Y. Sept. 30, 2005), Judge Stong provided an outline of the various statutes and rules that discussed the Court's inherent power to impose sanctions, which include 42 U.S.C. §1988, 28 U.S.C. §1927, F.R.B.P. 9011, F.R.B.P. 7037, F.R.C.P. 37 and 11 U.S.C. §105, holding that bankruptcy courts can impose sanctions under 28 U.S.C. §1927.

The courts are divided, however, as to whether bankruptcy courts have jurisdiction under 28 U.S.C. §1927 for imposition of sanctions. 28 U.S.C. §1927 reads as follows:

> "Any attorney or other person admitted to conduct cases in any court of the United States or Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Various circuits have held that the bankruptcy court has the ability to impose sanctions under 28 U.S.C. §1927. *Baker v. Latham Sparrow Bush Associates (In Re Cohoes Industrial Terminal, Inc.*) 931 F.2d 222, 230 (2nd Cir. 1991); *Citizens Bank & Trust Co. v. Case* (*In Re Case*), 937 F.2d 1014, 1023 (5th Cir. 1991); *In Re Schaefer Salt Recovery, Inc.,* 2008 WL 4138409 (3rd Cir. Sept. 9, 2008) (while not expressly defined in 28 U.S.C. §451 as a court of the United States, since the bankruptcy court is a unit of the district court it has sufficient authority to impose sanctions under 28 U.S.C. §1927).

Other decisions have found that the bankruptcy court is a court of the United States because it is a unit of the district court. *See In Re Volpert*, 177 B.R. 81 (Bankr. N.D. Ill. 1995), *aff'd* 186 B.R. 240 (N.D. Ill. 1995), *aff'd* 110 F.3d 494 (7th Cir. 1997); *In Re Brooks*, 175 B.R. 409 (Bankr. S.D. Ala. 1995); *In Re Casiello*, 333 B.R. 571 (Bankr. D. Ma. 2005); *In Re Osborn*, 375 B.R. 216 (Bankr. M.D. La. 2007); *In Re Brown*, 444 B.R. 691 (Bankr. E.D. Tex. 2009).

But see In Re Courtesy Inns, Ltd., Inc., 40 F.3d 1084, 1086 (10th Cir. 1994) (holding the bankruptcy court was not a "court of the United States" and thus lacked jurisdiction to sanction Chapter 11 debtor's president for having filed the petition in bad faith.); *Miller v. Cardinale* (*In Re Deville*), 361 F.3d 539, 546 (9th Cir. 2004) (finding that a bankruptcy court was not a "court of the United States"); *In Re Perroton*, 958 F.2d 889, 892-893 (9th Cir. 1992) (the bankruptcy courts are not Article III courts.).

TYPES OF SANCTION CLAIMS

Various types of sanction claims exist. These include:

1. Bad faith;
2. Contemptuous conduct;
3. Vexatious litigation;
4. Improper or needlessly burdensome discovery;
5. Automatic stay violations under 11 U.S.C. §362; and
6. Post-discharge issues under 11 U.S.C. §524.

Bad Faith

Bad faith has been defined as:

1) knowingly or recklessly raising a frivolous argument;
2) making a claim for an improper purpose;
3) delaying or disrupting litigation; and
4) hampering enforcement of a court order.

In Re Walker, 532 F.3d 1304, 1309 (11th Cir. 2008) (seriousness of allegations that were made by creditor's attorney against counsel to bankruptcy debtor, that counsel had committed fraud on court and planned to benefit personally at expense of creditors of the estate, coupled with minimal investigation conducted by creditor's attorney before making these allegations and a lack of any evidentiary support therefor, supported finding of bad faith on attorney's part as required for bankruptcy court to assess sanctions against attorney in exercise of its inherent power); *In Re Yorkshire*, 2008 WL 3306680, at *3 (5th Cir. Aug. 8, 2008).

In Re Cochener, 382 B.R. 311 (S.D. Tex. 2007) (debtor's counsel informed the trustee that the debtor would not participate in any creditors' meetings, objected to certain discovery document requests pursuant to Rule 2004, failed to produce documents and failed to appear at the hearings. The court denied Rule 9011 sanctions, but approved sanctions imposed under 11 U.S.C. §105 and 28 U.S.C. §1927 in the amount of $25,121.89 for attorneys' fees and costs in defending the motion to dismiss and prosecuting sanctions).

Thereafter, in *In Re Cochener*, 2008 WL 4681579 (5th Cir. Oct. 23, 2008), the 5th Circuit held that the bankruptcy court's findings were supported by evidence, whether measured by the preponderance standard or clear and convincing standard. It reversed the District Court and found that the court need not expressly lay out grounds for sanctions and sufficient evidence existed in the record to support a finding of bad faith.

In *In Re Yorkshire, LLC*, 2008 WL 3306680 (5th Cir. Aug. 8, 2008), the president of Yorkshire, LLC filed involuntary bankruptcy petitions against the debtor. The petitions were prepared in secret without consultation or knowledge of any owner or other officer regarding the petitions, and the attorney conducted little due diligence on the debtor's financial status, its ownership, or its management. The Bankruptcy Court concluded that the former president had filed the bankruptcy petitions with the motive of inflicting injury on the owners of the limited liability company and its affiliate. The sanctions awarded included $60,000.00 in attorneys' fees and an additional $50,000.00 against the president and a $40,000.00 sanction against the attorney.

In *In Re Khan,* 488 B.R. 515 (Bankr. E.D.N.Y. 2013), the trustee brought a fraudulent conveyance action against the debtor's son arising from the sale of real property that was jointly owned by the debtor, her son and a third party. The son asserted counterclaims against the trustee for abuse of process and "constitutional torts", seeking punitive damages and a permanent injunction barring the trustee from bringing actions against the debtor's family. The trustee

filed motions for sanctions against the son's counsel, arguing that he brought the counterclaims in bad faith and for the purpose of harassment and delay. Judge Stong awarded sanctions of $15,000.00 against counsel to be paid in three $5,000.00 installments.

In *Maxwell v. KPMG LLP,* 520 F3d 713 (7th Cir. 2008), the trustee filed suit against KPMG for breach of duty in care relating to auditing services it provided to the debtor during the debtor's acquisition of an internet consulting company just preceding the "dotcom" market collapse. The trustee alleged that KPMG performed a negligent audit, which overstated the debtor's earnings, enticing the internet consulting company into being acquired. Subsequent thereto, the debtor filed bankruptcy. In dismissing the claim by the trustee, the Court found that it must be vigilant in policing litigation judgment exercised by trustees in bankruptcy:

> "[F]rivolousness must depend not on the net expected value of a suit in relation with the cost of suing, but on the probability of the suit's succeeding. If that probability is very low, the suit is frivolous; really, that is all that most Courts, including ours mean by the word." *Maxwell v. KMPG, LLP*, 520 F3d 718-719 (7th Cir. 2008)

Bynum v. Am. Airlines, Inc., 166 F. Appx. 730, 732-33 (5th Cir. 2006) (Bankruptcy Rule 9011 authorizes the court to sanction either a client or his attorney without a finding of bad faith if the complaint lacks "evidentiary support.").

Marlin v. Moody Nat'l Bank, 533 F.3d 374 (5th Cir. 2008) (finding that monetary sanctions under Rule 9011 cannot be imposed against the client if the adversary action or complaint lacks legal support).

In Re Enron Corp. Sec., Derivative and ERISA Litigation, 463 F. Supp. 2d 628, 635-36 (S.D. Tex. 2006) (attorneys are at higher risk than clients for imposition of sanctions. "Moreover, it appears to this court more appropriate that an award of fees and costs under §11(e) should be borne by counsel: non-attorney clients more likely than not would not have the ability to determine at what point, based on what evidence, an action becomes legally 'frivolous', while its licensed counsel should and is held to such a standard.").

Bankruptcy Rule 7041 – Dismissal of Adversary Actions (incorporating Rule 41 of the Federal Rules of Civil Procedure)

Rule 41(d) of the F.R.C.P. provides as follows:

> (d) Costs of Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
>
> (1) may order the plaintiff to pay all or part of the costs of that previous action; and
>
> (2) may stay the proceedings until the plaintiff has complied.

In *In Re Shade, Inc.,* 2008 WL 3876327 (Bankr. D. Neb. Aug. 18, 2008), the bankruptcy trustee sold personal property for a total price of $181,000. The unsuccessful bidder filed a motion to reconsider the sale and then appealed the order, which was subsequently affirmed by the United States District Court for the District of Nebraska. After the successful bidder had removed the debtor's property from the unsuccessful bidder's real property, the unsuccessful bidder filed an application for administrative expenses seeking $221,456.73. The building owner/unsuccessful bidder asserted that the buyer damaged or converted the items of the building owner/landowner's property during the removal of the personal property and specifically claimed over $120,000 for personal property and fixtures allegedly owned by the building owner that were removed from the buildings "with the implied approval and consent of the trustee." The court denied the requested relief. Subsequently, the landowner commenced an action in the State District Court of Lancaster County, Nebraska seeking compensation for damages arising from the successful bidder's conversion of certain fixtures allegedly belonging to the landowner and destruction of landowner's fixtures and other personal property. The elements of Rule 41(d) as incorporated in Rule 7041 gave the court discretion to include reasonable attorney's fees and costs, citing *Civco Med. Instruments Co., Inc. v. Protek Med Prods., Inc.*, 231 F.R.D. 555, 564 (S.D. Iowa 2005).

See also Rogers v. Wal-Mart Stores, *Inc.,* 230 F.3d 866, 874 (6th Cir. 2000) (holding attorneys' fees are not available under Rule 41(d) because the rule does not explicitly provide for them); *Exposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000) (holding that attorneys' fees are recovered under Rule 41(d) only when the underlying statute allows such fees as part of the costs); *Cadle Co. v. Beury*, 242 F.R.D. 695, 697-98 (S.D. Ga. 2007) (holding that Rule 41(d) gives the court authority to award attorneys' fees because the rule drafters considered fees as part of costs); *Wason Ranch Corp. v. Hecla Mining Co.*, 2008 WL 906110 at *17 (D. Colo. Mar. 31, 2008) (holding that unpublished authority in the 10th Circuit permits attorneys' fees to be awarded under Rule 41(d)); *Evans v. Safeway Stores, Inc.,* 623 F.2d 121, 122 (8th Cir. 1980) (affirming an award of attorneys' fees under Rule 41(d)).

CIVIL AND CRIMINAL CONTEMPT IN BANKRUPTCY COURT

Bankruptcy courts have the power to enforce their orders by finding perpetrators in civil contempt. See 11 U.S.C. §105, 28 U.S.C. §157(b), F.R.B.P. 9024.

In *In Re Walters*, 868 F.2d 665 (4th Cir. 1989) an attorney appealed from the district court's affirmation of a bankruptcy court order requiring him to repay certain attorney's fees to his client and an order finding him in civil contempt. The bankruptcy court found that the attorney's challenge constituted civil contempt. The court had ordered in September that the attorney repay $14,000 of attorney's fees to the debtor. In December, the bankruptcy court ordered the attorney to appear and show cause why he shouldn't be held in contempt for his failure to comply with the September order. The attorney presented a $14,000 check and an order which would require the clerk to hold the funds pending appeal. The court rejected the order, insisting the funds be held only for 21 days and then, if no stay was granted by the

district court upon appeal, the money would go to the debtor. The attorney withdrew the check and the proposed order 43 days later. Having not received a stay from the district court, the bankruptcy court issued an order holding the attorney in civil contempt. The attorney argued that the finding of contempt was improper in a situation where the "party was willing to perform." The 4th Circuit held that the argument was flawed, as this was a civil contempt proceeding, not a criminal one.

> "The absence of willfulness does not relieve from civil contempt. Civil, as distinguished from criminal contempt, is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance…. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act."

The attorney challenged the authority of the bankruptcy court to find him in civil contempt under the plurality opinion of *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 102 S.Ct. 2858, 783 L. Ed. 2d 598 (1902).

The 4th Circuit found authority within *Marathon,* noting:

> "When Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define that right as created." (*Northern Pipeline*, 458 U.S. at 83).

More recently, *In Re Nat'l Heritage Foundation, Inc.*, 510 B.R. 526 (E.D. Va. 2014), the United States District Court, upon appeal, found authority under 11 U.S.C. §105(a) for the bankruptcy courts to issue civil contempt orders. As noted by the District Court:

> "Civil contempt must be shown by 'clear and convincing' evidence (1) of the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) that the decree was in the movant's 'favor'; (3) that the alleged contemnor by its conduct violated the terms of the decree and had knowledge (at least constructive knowledge) of such violation; and (4) that the movant suffered harm as a result." 510 B.R. at 541.

In *In Re MD Promenade, Inc.,* 2009 WL 80203, at *14 (Bankr. N.D. Tex. Jan. 8, 2009), the Court noted the purposes of civil contempt:

1. To enforce obedience of a court order;
2. To compensate parties for loss resulting from a violation of a court order;
3. Utilizing the following factors to determine sanctions:
    a. The harm from noncompliance;
    b. The probable effectiveness of the sanction;
    c. The financial resources of the contemnor and the burden the sanctions may impose.
4. The willfulness of a contemnor in disregarding the court's order.

In *In Re Horsfall*, 2011 WL 5865454 (Bankr. W.D. Wis. Nov. 17, 2011) the Bankruptcy Court found inappropriate courtroom conduct cause under F.R.C.P. 37 (as incorporated in F.R.B.P. 7037) for sanctions, holding that courts may dismiss cases under Rule 37 "when there is… contumacious conduct" in its presence. In this case, counsel for the bank, seeking to prevent the discharge of the debt owed to it asked numerous redundant questions as to which nearly all objections were sustained, failed to heed the Court's directives to limit the scope of his questions, "doggedly repeated… irrelevant questions…, frequently rolled his eyes…, made constant sotto voce comments (some vulgar) during the trial, which were heard by court staff and visitors to the courtroom…. [Counsel's] conduct was rude, petulant, immature and disrespectful…."

In *In Re Ho*, 2012 WL 405092 (E.D. La. Feb. 8, 2012), the District Court, on appeal, reversed a bankruptcy court's finding of civil contempt and sanctions when an attorney filed an amended Chapter 13 plan, which the Court believed was not consistent with plan modifications ordered by the court at a prior hearing. The appellate court noted in *Ho*:

> "A contempt order is classified as civil or criminal according to its purpose. [citation omitted]
>
> A contempt order is civil if its purpose is to coerce the contemnor into compliance with a court order, or to compensate another party for injuries or costs resulting from the contemnor's misconduct. [citation omitted]
>
> A contempt order is criminal if its purpose is to punish the contemnor for past conduct and to vindicate the court's authority. [citation omitted]
>
> In determining whether a contempt order is civil or criminal, a central question is whether the penalty imposed is absolute, or is conditioned upon the contemnor's future conduct. [citation omitted] (holding that a lump-sum fine that punishes past conduct is criminal, but a fine that accrues on an ongoing basis for continued noncompliance is civil)."

The appellate court found that the sanction imposed by the Bankruptcy Court was punitive in nature because it served no coercive purpose and did not compensate another party, holding that the order's purpose was to punish the appellant and to vindicate the bankruptcy court's authority. The Court thus concluded that it was criminal in nature, which the bankruptcy court post *Stern v. Marshall* clearly does not have authority to impose.

Criminal contempt of court is a crime under 18 U.S.C. §401(3). Once criminal contempt has been committed, the defendant cannot terminate the sanction by purging herself of the contempt.

Case law establishes three elements of criminal contempt:

1. The court must have issued a reasonably specific order;
2. The contemnor must have violated the order; and
3. The contemnor must have acted willfully.

In Re Holloway, 995 F.2d 1080, (D.C. Cir. 1993), *cert. denied* 511 U.S. 1030, 1145 S.Ct. 1537, 128 L. Ed. 2d 190 (1994), *United States v. KSTW Offshore Eng'g Inc.,* 932 F.2d 906, 909 (11th Cir. 1991).

Civil contempt requires clear and convincing evidence; criminal contempt requires a standard of proof beyond a reasonable doubt.

Bankruptcy judges, however, may incarcerate civil contemnors until they purge themselves of contempt or it is determined that continued incarceration is punitive in nature. *In Re Dugan*, 133 B.R. 671 (Bankr. D. Ma. 1991); *In Re Maxair Aircraft Corp.*, 148 B.R. 353 (N.D. Ga. 1992).

In *In Re Krause*, 367 B.R. 740 (Bankr. D. Kan. 2007) Chief Judge Robert Nugent imposed civil contempt sanctions under the authority granted under F.R.C.P. 37(b)(2)(C) and the inherent powers of the court under 11 U.S.C. §105(a). The Court issued a bench warrant for the debtor's apprehension and ordered civil incarceration until compliance with the Court's orders. The Court found that the debtor had violated numerous court orders.

Courts which deny jurisdiction conclude that, in order to impose sanctions under 28 U.S.C. §1927, the court must be a court of the United States. 28 U.S.C. §451 defines that term as:

> "The Supreme Court of the United States, courts of appeal, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior." Cited in *In Re Casiello*, 333 B.R. 571 (Bankr. D. Ma. 2005).

F.R.C.P. RULE 37 and F.R.B.P. RULE 7037

Rule 37 provides for sanctions against parties resisting discovery. Sanctions include:

1. Admitting designated facts as established for purposes of the action;
2. Prohibiting the disobedient party from opposing designated claims or defenses;
3. Striking pleadings;
4. Staying further proceedings;
5. Dismissing the action or proceeding;
6. Rendering a default judgment; or
7. Treating the failure as contempt in the case.

In *In Re Plise*, 506 B.R. 870 (9th Cir. BAP 2014) the 9th Circuit Bankruptcy Appellate Panel found that Rule 37 applies only to a party or a deponent in a contested matter or adversary proceeding. Citing Rule 9014 (Rule 7037 applies in contested matters); Rule 7037 (incorporating F.R.C.P. Rule 37 into adversary proceedings). Thus, the bankruptcy court could not resort to enforcement remedies under Rule 37 for noncompliance with a subpoena against a non-party.

Civil Rule 45(e) applies to sanctions against a non-party. It, however, has not been incorporated in either the 7000 series of the F.R.B.P. or under Rule 9014.

See also In Re Phaf, 536 B.R. 424 (9th Cir. BAP 2015) (reversing sanctions awarded under local rule, as opposed to Rule 7037); *In Re Sprouse*, 391 B.R. 367 (Bankr. N.D. Miss. 2008) (bankruptcy court had discretion to award sanctions under F.R.B.P. 7037 and F.R.C.P. Rule 37(b)(2).

OTHER SANCTIONS

Various courts have issued requirements for education/tutoring sanctions. In *In Re Hill*, Slip Opinion, Case No. 04-34887 (Bankr. Conn. Oct. 23, 2007), a bankruptcy judge required an offending attorney to identify and arrange to take two hours in legal ethics from an accredited law school and upon completion file a certificate of completion with the Court.

In the published decision "*In the Matter of Imposition of Sanctions Against Dan Turner"* incorporated in *In Re Kruckenburg*, 92-40667-12 (Bankr. D. Kan. June 29, 1994), the Court ordered sanctions under F.R.B.P. 9011 and Local Rule D. Kan. Bk. Rule 9011.1, finding that the following could be undignified and discourteous conduct of counsel:

1. Repeated instances of arguing with witnesses and counsel;
2. Being argumentative with the court;
3. Addressing the court with a loud, sarcastic, condescending and disrespectful tone of voice; and

4. Telling the debtor not to answer a question posed by the court while she was testifying.

The Court required Turner to complete six hours of ethics credit and six hours of trial practice and/or advocacy credits over a twelve month period. The credit hours had to be approved and accepted by Kansas Continuing Legal Education Commission and copies of certificates of compliance filed with the court.

In the Matter of Disciplinary Proceeding of Phelps, 637 F.2d 171 (10th Cir. 1981), an attorney was charged with making false statements to the Court, tendering testimony for illegal harassment, and carrying on a vendetta against one of the litigants.

In *Aston-Nevada Ltd. P'ship*, 391 B.R. 84 (Bankr. D. Nev. 2006), (former) Judge Bruce Markell imposed monetary sanctions and the following non-monetary sanctions:

1. Public reprimand;
2. All further pleadings would require a declaration concerning specific information about the facts of Aston-Nevada, as well as a copy of the Court's opinion in any further case filed by the law firm;
3. The law firm would refrain from listing bankruptcy as its specialty and area of practice on its website or in other promotional materials unless or until at least one partner had met the specified continuing legal education requirements; and
4. Disgorgement of all fees that it had received to represent the debtor and payment of those funds into the court's registry or to a program providing legal education services to low income clients.

In *Rossana*, 395 B.R. 697 (Bankr. D. Nev. 2008), *rev'd in an unpublished opinion*, *sub. nom., Beller v. Momot,* No. 2:08-CV-1139-RCJ-PAL (D. Nev. Sept. 3, 2009), the bankruptcy court sanctioned an attorney for violation of the Rules of Professional Conduct for rapid sequential representation of opposing parties and delivered the court's opinion to the bar disciplinary counsel for the state bar of Nevada. The *Rossana* Court reasoned:

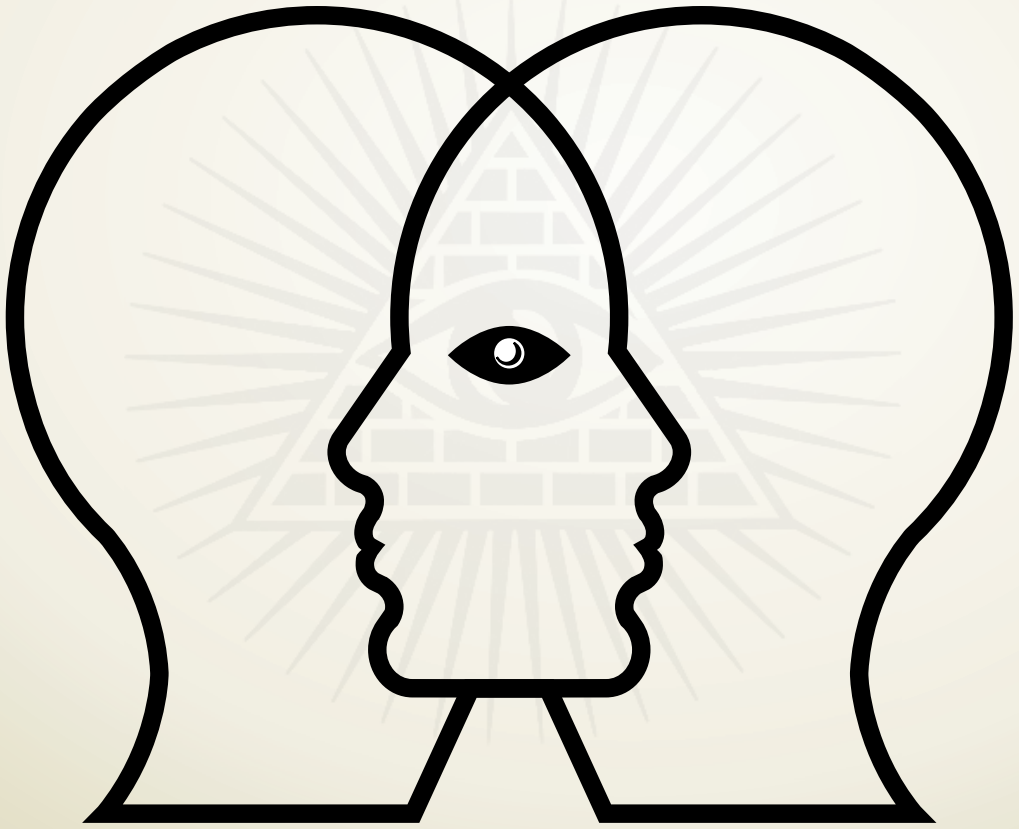
> "[A]n egregious violation of the Nevada Rules of Professional Conduct that [fell] outside all accepted norms of the legal profession [occurred]. Indeed, Beller's conduct discredit[ed] the work of all attorneys before this court and in the state of Nevada by calling into question whether attorneys will faithfully and morally serve the interest of their clients." *Id.* at 707.

CONCLUSION

The bankruptcy courts have many remedies available under the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, the Bankruptcy Code, other federal statutes, and case law. However, perhaps the best remedy that exists is for attorneys and the courts to recognize and make clear to all members of the bar that the appropriate Rules of Professional Conduct are not merely aspirational, but are a punch list for preferred conduct.

AMERICAN BANKRUPTCY INSTITUTE

REPORT ON STANDARDS OF PROFESSIONAL COURTESY and CONDUCT



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Report on Standards of Professional Courtesy and Conduct

Reporter:

Jessica D. Gabel
Associate Professor of Law
Georgia State University College of Law

Chair

James Patrick Shea
Armstrong Teasdale, LLP

Vice-Chairs

David W. Houston, IV
Burr & Forman LLP

Emily Taube
Adams and Reese LLP

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McGlinchey Stafford, PLLC

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Phoenix Division

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U.S. Bankruptcy Court, Northern District of Georgia

Edward T. Gavin, CTP
Gavin/Solmonese

Hon. Bruce A. Harwood
U.S. Bankruptcy Court, District of New Hampshire

Nina M. Parker
Parker & Associates

Nancy B. Rapoport
Gordon Silver Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas

Andrea B. Schwartz
U.S. Department of Justice
Office of U.S. Trustee

Hon. Elizabeth S. Stong
U.S. Bankruptcy Court, Eastern District of New York

Hon. Howard R. Tallman
U.S. Bankruptcy Court, District of Colorado

Deborah L. Thorne
Barnes & Thornburg LLP

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Stutman, Treister & Glatt PC

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Executive Director
American Bankruptcy Institute

Amy Alcoke Quackenboss
Deputy Executive Director
American Bankruptcy Institute

Report on Standards of Professional Courtesy and Conduct

Reporter:

Jessica D. Gabel
Associate Professor of Law
Georgia State University College of Law

Reporter's Notes:[1]

The need to promote civility is not a new topic. After all, Abraham Lincoln said, "There is a vague and popular belief that lawyers are necessarily dishonest."[2] In 1992, the Seventh Circuit adopted its official civility code,[3] a turning point that inspired hundreds of jurisdictions to codify their own understandings of professionalism and civility.[4] This widespread codification is due in large measure to a perceived increase in incivility among business and legal professionals. What was once a watershed moment has now reached a tipping point. Indeed, over the past 30 years, the "biggest negative change [in the legal profession] has probably been the decreased emphasis on professionalism."[5] Yet despite this universal concern about incivility, there has been little discussion or study regarding unprofessional or uncivil behavior among insolvency professionals.[6]

I. Duties of civility and professionalism.

In striving to fulfill their duties and responsibilities to the public, insolvency professionals[7] must remain conscious of the broader duty owed to their profession. The bankruptcy process is part of a larger legal system that is adversarial by design, and insolvency professionals must ardently represent their respective positions to ensure that the system is effective and trusted. But also rooted in bankruptcy, perhaps more so than in other areas of litigation, are the concepts of cooperation and

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[1] James Patrick Shea (Civility Task Force Chair), David Houston, IV (Vice Chair), Emily Taube (Vice Chair), Nancy B. Rapoport, Deborah L. Thorne, and Bill P. Weintraub put together an excellent first draft of this topic, and I thank them. Additionally, I thank Civility Task Force members Rudy J. Cerone, Hon. Daniel P. Collins, Hon. Mary Grace Diehl, Edward T. Gavin, Hon. Bruce A. Harwood, Nina M. Parker, Andrea B. Schwartz, Hon. Elizabeth S. Stong, Hon. Howard R. Tallman, Hon. Gregg W. Zive, and James T. Markus. Finally, I thank Ashley D. Champion, Phillip Parham III, and Kimberly B. Reeves, graduates and students at Georgia State University College of Law, for their hard work in assisting our Task Force.

[2] Abraham Lincoln, July 1, 1850.

[3] STANDARDS FOR PROFESSIONAL CONDUCT, U.S.C.S. Ct. App. 7th Cir., Appx. (LexisNexis 2013).

[4] Howard Merten, *The Case for Self-Interested Civility*, F.D.C.C. Q., Jan. 1, 2012 at 214; *see also*, Ctr. for Prof'l Resp., *Professionalism Codes*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last updated August 2012) (listing more than 100 jurisdictional professionalism codes).

[5] Jim Maiwurm, *Above the Law Interrogatories: 10 Questions with Jim Maiwurm of Squire Sanders*, ATL INTERROGATORIES (MAY 22, 2013, 2:55 PM), http://abovethelaw.com/2013/05/the-atl-interrogatories-10-questions-with-jim-maiwurm-of-squire-sanders/; *see, e.g.*, Howard Merten, *The Case for Self-Interested Civility*, supra note 4.

[6] Despite the lack of empirical evidence related to the insolvency world, it is undeniable that, in recent years, there has been an increase in unprofessional and uncivil behavior among insolvency professionals; yet no civility code relates strictly to the bankruptcy profession.

[7] The American Bankruptcy Institute "includes more than 13,000 attorneys, auctioneers, bankers, judges, lenders, professors, turnaround specialists, accountants and others bankruptcy professionals." *About ABI*, AM. BANKR. INST., http://www.abiworld.org/AM/Template.cfm?Section=About_ABI (last visited July 5, 2013).

negotiation, and those components seem to have become misplaced in an increasingly uncivil legal climate.

While some headlines may make us snicker, others leave us disappointed. The collection of attorney misconduct stories reiterate that the system's integrity must be fortified by ensuring that members' conduct adheres to fundamental concepts of civility.[8] Undoubtedly, a professional owes his colleagues a certain level of candor, courtesy, fairness, and cooperation. Indeed, the bankruptcy system is a "civilized mechanism for resolving disputes, but only if the [professionals] themselves behave with dignity."[9] In disagreement, we must not be disagreeable.

II. Addressing civility among bankruptcy professionals.

Despite the apparently heavy-handed focus on changing the character of professionals' interactions, the lack of civil behavior continues to plague professional communities.[10] Incivility comes with a high price. As Judge Gene E.K. Pratter (addressing opposing litigators' incivility) commented, "[U]ncivil, abrasive, abusive, hostile or obstructive conduct . . . impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently."[11]

For over two decades, the legal community has attempted to quash incivility among members, but the problem seems more deeply entrenched in professional culture despite efforts to excise the growth. While the causes and effects of this troubling trend are numerous, growing

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[8] *See* Jennifer Smith, *Lawyers Behaving Badly Get a Dressing Down from Civility Cops*, WALL ST. J. (U.S.), Jan. 27, 2013 (the prevalence of in-court shouting and vulgar emails and phone calls to judges and clients further damages the already poor reputations of "Rambo" litigators), *available at* http://online.wsj.com/article/SB10001424127887323539804578263733099255320.html; *e.g.*, *Goldberg v. Mt. Sinai Med. Ctr. of Greater Miami, Inc.*, 2007 Bankr. LEXIS 2780, *6 (ordering bankruptcy attorney William P. Smith (appearing *pro hac vice*) to attend professionalism course for telling U.S. Bankruptcy Judge Laurell Isicoff, "[Y]ou're a few French fries short of a Happy Meal," because "there is no jurisdiction in the United States . . . [where Smith's comments] would fall within the bounds of professional behavior."); Debra Cassens Weiss, *11th Circuit OKs Sanction for Brief Calling Judge's Findings 'Half Baked' and Wine Peace Offering*, A.B.A. J., Oct. 17, 2012, *available at* http://www.abajournal.com/news/article/11th_circuit_oks_sanction_for_brief_calling_judges_findings_half_baked_wine (reporting that the Eleventh Circuit Court of Appeals upheld bankruptcy attorney Kevin Gleason's 60-day suspension for calling U.S. Bankruptcy Judge John Olson's rulings "half-baked," then sending a bottle of wine to the judge's chambers with a note inviting him to resolve the issue "privately"); G.M. Filisko, *Be Nice: More States Are Treating Incivility as a Possible Ethics Violation*, A.B.A. J., Apr. 2012, *available at* http://www.abajournal.com/magazine/article/be_nice_more_states_are_treating_incivility_as_a_possible_ethics_violation (reporting that famed Jack Kevorkian attorney Geoffrey Fieger compared three Michigan Court of Appeals judges to Hitler and other Nazis on his radio program after the three-judge panel overturned a $15M jury verdict for his client); Kyle Munzenrieder, *Lawyers Thrown Off Case for Drawing D*** Pics, Playing Angry Birds During Deposition*, Miami New Times Blog (May, 17 2012, 12:26 PM), *available at* http://blogs.miaminewtimes.com/riptide/2012/05/lawyers_drew_dick_pictures_and.php (reporting that two attorneys, Richard Cellar and Stacey Schulman, and the Morgan & Morgan firm were disqualified from a case because one lawyer drew pictures of male genitalia and played the video game Angry Birds during depositions); Debra Cassens Weiss, *Courtroom 'Shoutfest' over Scheduling Conflict Results in $200 Fine for Lawyer*, A.B.A. J., Apr. 3, 2012, *available at* http://www.abajournal.com/news/article/lawyer_is_fined_200_after_scheduling_conflict_spurs_courtroom_shouting.

[9] Melvin F. Right, Jr., *I'll See You in Court!,* N.C. CH. J.'S COMM'N ON PROF'LISM, (Feb. 2012), available at http://www.nccourts.org/Courts/CRS/Councils/Professionalism/Documents/seeyouincourt-feb2012.pdf.

[10] *See*, *e.g.*, Julie Kay, *Got Civility? Litigation Is Getting Uglier than Ever*, DAILY BUS. REV., Jan. 28, 2013, *available at* http://dailybusinessreview.com/PubArticleDBR.jsp?id=1202585857660&slreturn=20130607200553.

[11] Michael J. Newman, *Being the Lawyer You Want to Be,* THE LEGAL INTELLIGENCER, March 22, 2013 (citing *Huggins v. Coatesville Area Sch. Dist.*, CIV A. 07-4917 (E.D. Pa. Sept. 16, 2009)), *available at* http://law.com/jsp/pa/PubArticlePA.jsp?id=1202593170481.

incivility is likely attributable in large part to the business (and legal) world's rapidly changing landscape. Popular culture continually embraces over-the-top portrayals of hard-nosed lawyers, judges, and businessmen.[12] Factor in technological advances,[13] a globalized business market,[14] decreased mentorship within the legal community,[15] and vague professionalism policies,[16] and it creates a perfect storm that may affect young professionals' misguided understanding of professionalism.[17] Reversing the trend will require changing the culture. The task of clearly defining acceptable standards of conduct lies with each profession's governing body, but personal responsibility for one's actions must also be at the forefront of civility consideration.

During his tenure as president of the American Bankruptcy Institute, Geoffrey L. Berman created the Civility Task Force[18] to promulgate principles of civility within the context of the insolvency profession. Under the leadership of ABI's immediate past-president, Jim Markus, and current president Patricia A. Redmond, the Task Force drafted the proposed Principles of Civility, a professionalism initiative intended to be a framework on which to build civility among bankruptcy professionals and fortify ABI's leadership role in policymaking and education.

The bankruptcy profession largely is self-regulating. Thus, re-emphasizing professionalism must begin with each member's commitment to carry out his or her duties to colleagues, clients, and the public in a manner that instills trust and confidence in the profession. The Principles are designed to guide ABI's member community of more than 13,000 by codifying fundamental concepts of civility. Accordingly, the proposed Principles are not intended to supplement professional ethical codes, nor are they to be enforced by a disciplinary committee.[19] Rather, these Principles of Civility are aspirational — meant to encourage members to rise above the fray to promote the profession's integrity and instill in the public a trust in the bankruptcy system. Accordingly, the Principles' effectiveness relies on individuals maintaining accountability to themselves and their peers.

III. Standards of civility and professionalism across jurisdictions.

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[12] G.M. Filisko, *You're Out of Order! Dealing with the costs of incivility in the legal profession*, A.B.A. J., Jan. 2013, at 37.

[13] Gone are the days when written communications were carefully crafted with time to reflect on the content of letters before putting them in the mailbox. Today, typing a strongly worded email and hitting send is often a source of strife among colleagues. *See* G.M. Filisko, *You're Out of Order!*, supra note 12 ("By far, technology is cited most often as the foundation for boorish behavior."); David Bernstein, *A New Civility Standard*, VOLOKH CONSPIRACY (Mar. 4, 2013, 4:36 PM), http://volokh.com/2013/03/04/a-new-civility-standard.

[14] Generally, today's business environment requires interacting with colleagues from different towns, states, or even countries. *See*, *e.g.*, Julie Kay, *Got Civility?*, supra note 10 ("Now [professionals] frequently parachute in[] . . . from out of town and may not know or ever see the same [people] again.").

[15] G.M. Filisko, *You're Out of Order!*, supra note 12, at 37.

[16] *See*, *e.g.*, Kay, *Got Civility?*, supra note 10; Phillip Bantz, *All fun and games until free speech rights in S.C. get violated*, S.C. Law. Wkly., Feb. 1, 2013 (listing reasons judges and Florida bar associations have given for the rise of incivility in Florida's legal profession), *available at* http://sclawyersweekly.com/news/2013/02/01/all-fun-and-games-until-free-speech-rights-get-violated.

[17] G.M. Filisko, *You're Out of Order!*, supra note 12.

[18] The Civility Task Force is a stand-alone committee created to work with ABI's Ethics and Professional Compensation Committee in order to address standards of conduct within the bankruptcy profession.

[19] In this sense, the Principles fit within the "'Professionalism' as Focus of Aspiration" definition from Robert Atkinson: "voluntary conformity with legally unenforceable standards." Robert Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 275 (1995).

As a starting point, the American Bar Association's House of Delegates adopted Resolution 108, which, at a general policy level, encourages attorneys to promote public discourse. The Resolution also calls for lawyers to personally take notice and take charge of the degree to which they engage in civil discourse, and to exercise self-management of communicative etiquette in all of their professional dealings. The Resolution also puts the onus on bar associations to take "meaningful steps" toward fostering civil discourse and promoting the lawyer's role in its realization. This purposefully vague call to action is intended to encourage creative pursuits — no matter how big or small — provided that the step is taken to promote and embody civil public discourse in the law profession.

IV. The American Bankruptcy Institute's Principles of Civility

"Every action done in company ought to be with some sign of respect to those that are present." – George Washington, ca. 1744.

A. Goal(s) and purpose(s) of the Principles.

Purpose(s). In furtherance of the fundamental concepts of civility, these Principles are designed to define the expected degree of courtesy and professionalism among insolvency professionals and to provide specific guidance to those new to bankruptcy practice as to how to maintain an acceptable standard of professional conduct. The Principles are intended to educate and guide professionals who are representatives of — or practicing in — American bankruptcy courts.

Although professionals are encouraged to comply with the Principles, this civility code does not establish enforceable minimum standards of professional care or competence. Rather, the Principles should be considered against the context of the professional's duty to represent clients competently, diligently, and ethically, and to promote the ideals of professional courtesy, conduct, and cooperation.

The Principles are not a basis for litigation, sanctions, or penalties. Nothing in the Principles supersedes existing ethics rules or alters existing standards of conduct against which professional negligence may be determined. Instead, ABI intends that its members voluntarily agree to adhere to these Principles so as to improve the bankruptcy profession and the administration of justice for all of its participants.

Goal(s). Consider ethics and professionalism issues in bankruptcy practice and make recommendations for uniform standards.

B. Principles of Civility[20]

Preamble

Professionals should be mindful of the need to protect the integrity of the bankruptcy process in the eyes of the public and in the eyes of the legal community around us.

General Duties of Professionals

1. Professionals should be courteous and civil in all professional dealings with other persons.

a. Professionals should act in a civil manner regardless of the feelings that they or their clients may have toward others.

b. Professionals can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. In all communications, professionals should avoid vulgar language, disparaging personal remarks, or other indications of acrimony toward counsel, parties, witnesses, and court personnel.

c. Professionals should require that persons under their supervision conduct themselves with courtesy and civility.

2. When not inconsistent with their clients' interests, professionals should cooperate with other professionals in an effort to avoid litigation and to resolve litigation that already has commenced.

a. Professionals should avoid unnecessary motion practice or other judicial intervention whenever it is practicable to do so.

b. Professionals should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another directly (in person or by telephone) and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

3. Professionals should respect the schedule and commitments of others, consistent with the protection of the client's interests.

a. On receipt of any inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a professional should — if not inconsistent with the legitimate interests of the client — agree to the proposal or offer a counter-suggestion that is as close in time to the original proposal as is reasonably possible.

[20] Many of the concepts incorporated into the Principles of Civility began with the Administrative Order issued by the Bankruptcy Court for the Eastern District of New York that adopted the New York State Standards of Civility. *See* Ch. J. Judith S. Kaye, *Standards of Civility,* NEW YORK STATE UNIFIED CT. SYSTEM, (Oct. 1997), *available at* http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/2009_ethics_h.authcheckdam.pdf.

b. A professional should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected. Ordinarily, the first request for an extension of time should be granted as a matter of courtesy.

c. A professional should consult with others regarding scheduling matters in a good-faith effort to avoid scheduling conflicts. Likewise, a professional should cooperate with others when scheduling changes are requested, provided that the legitimate interests of his or her client will not be jeopardized.

d. A professional should not attach unreasonable conditions to any extensions of time. A professional is entitled to impose conditions appropriate to preserve rights that an extension otherwise might jeopardize.

e. A professional should not request a calendar change or misrepresent a conflict in order to obtain an undue advantage or delay.

f. A professional should advise clients against the strategy of refusing to accede to time extensions for the sake of appearing "tough."

4. A professional should not initiate communications with the intention of gaining undue advantage from the recipient's lack of immediate availability.

5. A professional should return telephone calls promptly and respond to communications that reasonably require a response, with due consideration of time zone differences and other known circumstances affecting availability.

6. The timing and manner of the servicing of papers should not be designed to cause disadvantage or embarrassment to the party receiving the papers.

7. A professional should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

a. A professional should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.

b. A professional should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

c. A professional should base discovery objections on a good-faith belief in their merit and should not object solely for the purpose of withholding or delaying the disclosure of relevant information.

8. In out-of-court proceedings, professionals should not engage in any conduct that would not be appropriate in the presence of a judge.

9. A professional should keep his or her word.

10. A professional should not mislead others involved in the bankruptcy process.

a. A professional should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

b. A professional exchanging drafts with others should identify any changes in the drafts or otherwise explicitly bring those changes to the attention of the recipient.

General Duties of Lawyers

1. Lawyers should be respectful of the schedules and commitments of others.

a. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is calculated to permit full and fair representation of the matter to be adjudicated and to permit an appropriate time for the lawyer's adversary to prepare a full response.

b. A lawyer should notify other counsel and, if appropriate, the court and other persons foreseeably affected at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed, and should inform the court as soon as possible as to whether the parties will seek to have the matter continued or whether the matter has been resolved.

c. A lawyer should serve papers to other counsel with the understanding that all parties should have adequate time to consider their contents.

2. In examinations and other proceedings, as well as in meetings and negotiations, professionals should conduct themselves with dignity and refrain from displaying rudeness and disrespect.

a. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at examinations, and at conferences.

b. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary to protect the legitimate interests of the client.

c. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

3. **Lawyers should not mislead others involved in the bankruptcy process.**

   a. A lawyer should not ascribe a position to another professional that he or she has not taken or otherwise seek to create an unjustified inference based on the professional's statements or conduct.

   b. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

Lawyers' Duties to the Court and Court Personnel

1. **A lawyer is both an officer of the court and an advocate. As such, a lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court and its personnel.**

   a. A lawyer should speak and write civilly and respectfully in all communications with the court and court personnel, avoiding histrionics and innuendo.

   b. A lawyer should stipulate to relevant matters if they are undisputed and if no good-faith advocacy basis exists for a refusal to so stipulate.

   c. A lawyer should use his or her best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

   d. A lawyer should not engage in conduct intended primarily to harass or humiliate witnesses, parties, or professionals.

   e. During court proceedings, a lawyer shall maintain neutral behavior and refrain from making inappropriate gestures, facial expressions, audible comments, or similar attitudes. A lawyer shall also advise clients to conduct themselves similarly.

2. **Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.**

   a. A lawyer should be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

   b. A lawyer should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible. Parties should notify the court of requested continuances or resolutions as soon as practicable.

   c. A lawyer should use his or her best efforts to ensure that persons under their direction act civilly toward court personnel.

Duties of Judges and Court Personnel to Lawyers, Parties, and Witnesses

1. A judge should be patient, courteous, and civil to lawyers, parties, and witnesses.

a. A judge should maintain control over the proceedings and ensure that the proceedings are conducted in a civil manner.

b. Judges should not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

c. To the extent consistent with the efficient conduct of litigation and other demands on the court, judges should be considerate of the schedules of lawyers, parties, and witnesses when scheduling hearings, meetings, or conferences.

d. Judges should be punctual in convening all trials, hearings, meetings, and conferences; if delayed, they should notify counsel when practicable.

e. Judges should make all reasonable efforts to promptly decide all matters presented to them for decision.

f. Judges should use their best efforts to ensure that court personnel under their direction act civilly toward lawyers, parties, and witnesses and be mindful of the far-reaching consequences of sanctions before imposing them.

2. Court personnel should be courteous, patient, and respectful while providing prompt, efficient, and helpful service to all persons having business with the courts.

a. Court employees should respond promptly and helpfully to requests for assistance or information; if the requests are for information that a court employee is not permitted to provide, then the court employee should refuse that request with an explanation of the reason for the refusal.

b. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.

c. Court employees should avoid unfounded and unreasonable attacks on lawyers and the judiciary.

d. When circulating documents, a court employee should explicitly highlight all proposed changes.