AMERICAN BANKRUPTCY INSTITUTE

Bankruptcy 2022:
Views from the Bench

Ethics Challenges of Today

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2022

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I. ETHICAL ISSUES IN SUBCHAPTER V

Enactment of subchapter V of chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1181 – 1195) through the passage of the Small Business Reorganization Act of 2019 (the "SBRA") introduced new ethical issues and highlighted others. In these materials we cover two of those issues: the role of the subchapter V trustee and the importance of attorney disinterestedness.

A. Role of Subchapter V Trustee

Section 1183 of the Bankruptcy Code provides that a trustee will be appointed in each subchapter V case. A unique role of a subchapter V trustee is the duty to "facilitate the development of a consensual plan of reorganization." In its Handbook for Small Business chapter 11 Subchapter V Trustees, the U.S. Trustee Program describes the obligations of this duty as follows:

> As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose, and the trustee should encourage communication between all parties in interest as the plan is developed. The trustee should be proactive in communicating with the debtor and debtor's counsel and with creditors, and in promoting and facilitating plan negotiations. Depending upon the circumstances, the trustee also may participate in the plan negotiations between the debtor and creditors and should carefully review the plan and any plan amendments that are filed.

U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials, p. 3-9. This necessarily involves the sharing of information with the trustee. Ethical tensions may arise as counsel for the debtor and creditors balance the desire to utilize the subchapter V trustee's role as facilitator to obtain a good result for their client. The Rules of Professional Conduct provide the following guidance for the treatment of confidential information:

> MRPC 1.6 (Confidentiality of Information)
>
> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> . . .
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Va. RPC 1.6 (Confidentiality of Information)

> (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
>
> . . .
>
> (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Potential concerns about sharing confidential information may be amplified in subchapter V cases where the debtor is removed as debtor-in-possession under Section 1185 of the Bankruptcy Code, causing the subchapter V trustee to shift their role to adopt the duties in Section 1183(b)(5). This can include operating the business of the debtor.

In fulfilling the duties of Section 1183, the subchapter V trustee may also adopt the role of mediator. *See In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n.81 (Bankr. S.D. Fla. 2020) ("A substantial part of the Subchapter V trustee's preconfirmation role, therefore, should be to serve as a de facto mediator between the debtor and its creditors."). Subchapter V trustees who are lawyers should keep in mind the following professional conduct obligations:

MRPC 2.4 (Lawyer Serving as Third-Party Neutral)

> (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

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Va. RPC 2.4 - ABA Model Rule not adopted; RPC 2.10 (Third Party Neutral)

(a) A third party neutral assists parties in reaching a voluntary settlement of a dispute through a structured process known as a dispute resolution proceeding. The third party neutral does not represent any party.

(b) A lawyer who serves as a third party neutral

(1) shall inform the parties of the difference between the lawyer's role as third party neutral and the lawyer's role as one who represents a client;

(2) shall encourage unrepresented parties to seek legal counsel before an agreement is executed; and

(3) may encourage and assist the parties in reaching a resolution of their dispute; but

(4) may not compel or coerce the parties to make an agreement.

…

B. Attorney Disinterestedness

Section 327(a) governs the employment of professionals for the subchapter V estate, and requires such professionals to be "disinterested persons." 11 U.S.C. § 327(a). Section 101(14) of the Bankruptcy Code defines a disinterested person as a person that, among other things, "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C).

Subchapter V has proven to be popular with small businesses. According to the statistics on the American Bankruptcy Institute's website, a total of 3737 subchapter V cases have been filed as of August 14, 2022. Small businesses often have significant overlap between the interests of the corporate entity and that of the individual owner. In connection with ensuring that they are disinterested persons as required by the Bankruptcy Code, attorneys must also keep in mind their professional conduct responsibilities. This requires attorneys to be aware of potential conflicts of interest, obtain written informed consent from both clients in the case of dual representation, and ensure that any such connections are disclosed to the Court. The Rules of Professional Conduct provide:

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MRPC 1.7 (Conflict of Interest: Current Clients)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Va. RPC 1.7 (Conflict of Interest: General Rule)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> >
> > (4) the consent from the client is memorialized in writing.

For example, in *In re NIR West Coast, Inc.*, 638 B.R. 441 (Bankr. E.D. Cal. 2022), the Court denied a fee application of debtor's counsel in a subchapter V case after learning that the law firm represented both the debtor and the debtor's principal, who was identified in the debtor's schedules as a co-debtor, guarantor, recipient of preferential transfers, and creditor. *Id.* at 444. The Court found cause to deny the application for compensation based both on the conflict and on the lack of disclosure. *Id.* at 443. *See also, In re Black & White Stripes, LLC*, 623 B.R. 34 (Bankr. SDNY 2020) (finding proposed bankruptcy counsel's brief prepetition representation of debtors' principals in state court action to be a disqualifying conflict in jointly administered chapter 11 cases where one of the estate's most significant assets was avoidance claims against those same members).

Subchapter V trustees are also required to be disinterested persons. 11 U.S.C. § 1183(a). In *In re 218 Jackson LLC*, 631 B.R. 937 (Bankr. M.D. Fla. 2021), the Court found cause to disqualify and remove a subchapter V trustee on the basis of a lack of disinterestedness. *Id.* at 949. The trustee represented creditors in another bankruptcy case who were suing the individual who was the Debtor's ultimate principal. *Id.* at 942. The Court determined that the trustee was not impartial and held a materially adverse interest to the Debtor's principal, who was treated as an equity security holder, on the basis of the on-going representation. *Id.* at 949. The trustee's application for compensation was also denied. *Id.* at 950.

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II. FUTURE CLAIMANTS' REPRESENTATIVE ("FCR") STANDARDS

An issue that has featured in mass tort case headlines recently is the appointment of a future claimants' representative ("FCR"). Although required by Section 524(g) of the Bankruptcy Code in cases involving asbestos claims for decades, differing standards arose over how to properly evaluate whether a conflict prevents a desired person from filling the role of FCR.

A. Disinterestedness v. Fiduciary

In *In re Imerys Talc America, Inc.*, 38 F4th 361 (3d Cir. 2022), the Third Circuit weighed in on the proper standard for FCRs, resolving a split among lower courts. Imerys and proposed FCR James Patton argued in favor of the "disinterested person" definition set forth in Section 101(14) of the Bankruptcy Code to govern FCR appointments. *Id.* at 374, The insurance companies challenging Mr. Patton's appointment advocated for a "guardian-*ad-litem* test," (as essentially adopted by the Bankruptcy Court) plus the application of a per se disqualification for any actual conflict of interest in accordance with Section 327(a), (c). *Id.* The U.S. Trustee, as amicus, agreed with the insurers and the Bankruptcy Court that a high standard "applicable to fiduciaries who represent parties not before the Court" is appropriate. *Id.* In affirming the judgment of the District Court, the Third Circuit examined the statutory text and legislative history, drawing an analogy to the Creditors Committee in holding that a fiduciary standard is appropriate for FCRs.

Once the Third Circuit established the applicable standard, it applied that standard to Mr. Patton's proposed appointment as FCR. The primary basis for the insurers' objection to his appointment was his firm's representation of many insurance companies in insurance coverage disputes relating to environmental liabilities "including asbestos claims but unrelated to talc claims or the Debtors." *Imerys*, 38 F.4th at 368. On the topic of conflicts of interest and current clients, the Rules of Professional Conduct provide:

> MRPC 1.7 (Conflict of Interest: Current Clients)/Va. RPC 1.7 (Conflict of Interest: General Rule)
>
> *See* Section I.B above.

The Court looked to Comment 22 of Model Rule 1.7 in evaluating the effectiveness of a prospective waiver included in insurance work engagement. The Comment provides in part:

> [22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. ….

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MRPC 1.7, Comment 22. The Court found that the waiver at issue "was quite clear not only that Young Conaway might be involved in bankruptcy proceedings in which the Insurers would be creditors, but also that the firm was likely to be involved in FCR work specifically." *Imerys*, 38 F.4th at 380.

Although the Rules of Professional Conduct may be useful to a Court's analysis, the requirements under the Bankruptcy Code and an attorney's professional conduct obligations are distinct. The Third Circuit considered the impact of the Model Professional Rules in a non-FCR related decision in *In re Boy Scouts of America*, 35 F.4th 149 (3d 2022), declining to hold that courts must always consider the applicable Rules of Professional Conduct before reaching a conclusion on whether a party does not hold an adverse interest and is disinterested under Section 327. *Id.* at 158. The Court explained that "[s]ection 327 and the Rules of Professional Conduct impose independent obligations." Id. (citing 1 Collier on Bankruptcy § 8.03[2] ("[A]ttorneys have an independent duty, apart from the particular requirements of the Bankruptcy Code or rules, to conform their activities to [the local rules governing professional conduct].")).

Although there may be some debate as to their applicability to the role,[1] persons interested in serving in the role of FCR should in an abundance of caution also consider the professional duties to prospective clients and the rules governing solicitation of clients. The Rules of Professional Conduct provide:

> MRPC 1.18 (Duties to Prospective Client)
>
> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

[1] *See Imerys*, 38 F.4th at 378, n. 14 (Court noting that Imerys disputed that MRPC Rule 1.7 applies to the FCR role, arguing that "the FCR is not, technically, a 'lawyer' representing a 'client' as contemplated by the terms of the rule" but finding the debate to be "largely beside the point.").

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(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Va. RPC (Duties to Prospective Client)

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

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(i) the disqualified lawyer is timely screened from any participation in the matter; the disqualified lawyer reasonably believes that the screen would be effective to sufficiently protect information that could be significantly harmful to the prospective client; and

(ii) written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client.

MRPC 7.3 (Solicitation of Clients)

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or

directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Va. RPC 7.3 (Solicitation of Clients)

(a) A solicitation is a communication initiated by or on behalf of a lawyer that is directed to a specific person known to be in need of legal services in a particular matter and that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit employment from a potential client if:

(1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits.

(c) Every written, recorded or electronic solicitation from a lawyer shall conspicuously include the words "ADVERTISING MATERIAL" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic solicitation, unless the recipient of the solicitation:

(1) is a lawyer; or

(2) has a familial, personal, or prior professional relationship with the lawyer; or

(3) is one who has had prior contact with the lawyer.

(4) is contacted pursuant to court-ordered notification.

(d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1, including online group advertising;

(2) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service;

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(3) pay for a law practice in accordance with Rule 1.17; and

(4) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

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III. ETHICAL CHALLENGES FROM REMOTE PROCEEDINGS

Systems and procedures developed in the transition to remote proceedings forced by the COVID-19 pandemic can serve to conserve court and party resources, but remote proceedings also present a number of ethical challenges that must be considered.

A. Technical Competence

Attorneys have a professional responsibility to maintain technical competence. In the realm of remote proceedings, this may include familiarity with Zoom.gov or other remote hearing technology, both for the attorney's use and to be able to guide the client in using the application.

> MRPC 1.1 (Competence)/Va. RPC 1.1(Competence)
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In ensuring one can provide competent representation in remote proceedings, do not overlook the opportunities provided by the Court itself. Many courts are willing to offer certain types of assistance designed to help virtual hearings run more smoothly, such as a test run, access to IT professionals to answer tech questions, or remote hearing technology training modules.

B. Witness Testimony

Bankruptcy Rule 9017 governs evidence in bankruptcy and incorporates Federal Rule of Civil Procedure 43 to apply in cases under the Bankruptcy Code. Civil Rule 43(a) Taking Testimony provides that:

> (a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Fed. R. Civ. P. 43(a). This raises the question of what is "good cause in compelling circumstances" to seek authority for remote testimony. For example, the "mere inconvenience of a witness" was held to not be a compelling circumstance that would preclude the need for a witness to testify in open court as opposed to a telephonic or video appearance. *In re Mikolajczyk*, 2015 Bankr. LEXIS 1883 (Bankr. W.D. Mich. June 3, 2015). In addition, the Rules of Professional Conduct obligate an attorney to be honest in evaluations of compelling circumstances, providing that:

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MRPC 3.3 (Candor toward the Tribunal)

(a) A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> . . .
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

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

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

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

Va. RPC 3.3 (Candor toward the Tribunal)

(a) A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal;
>
> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> . . .

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> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
>
> (b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
>
> (c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
>
> (d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.
>
> (e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

The requirements of Rule 43(a) also require consideration of the attorney's role in ensuring "appropriate safeguards" are in place for remote witness testimony. Examples of remote proceeding safeguards may be ensuring that no others are in the room with a witness, and that a witness is not accessing the internet or other documents during testimony. Failure to adhere to such appropriate safeguards may also implicate professional responsibilities. The Rules of Professional Conduct provide:

> MRPC 3.4 (Fairness to Opposing Party and Counsel)
>
> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> . . . .

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Va. RPC 3.4 (Fairness to Opposing Party and Counsel)

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

. . .

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

. . . .

The rise of remote proceedings was accompanied by occasional reports of bad behavior by lawyers, such as texting clients to coach them on how to answer questions in trial. It should go without saying that although remote proceedings may provide opportunities for abuse, attorneys who participate in this abuse are likely engaging in professional misconduct. The Rules of Professional Misconduct provide:

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ETHICS CHALLENGES OF TODAY

MRPC 8.4 (Misconduct)

It is professional misconduct for a lawyer to:

(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;

. . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

. . . .

Va. RPC 8.4 (Misconduct)

It is professional misconduct for a lawyer to:

(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) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

. . . .

C. Confidentiality Issues

Another issue related to remote proceedings is confidentiality, or the lack thereof. Confidential attorney/client communications may be jeopardized in remote hearings, whether from the presence of others in the room when advising a client, or from an inability to privately advise a client remotely. Although COVID-19-related adaptions may have brought certain technological advances, a 2010 survey by the National Center for State Courts found that 37 percent of courts using videoconferencing had no provisions to enable private communications between attorneys and their clients when they were in separate locations. Eric Bellone, "Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom," Journal of International Commercial Law and Technology 8 (2013): 44–45.

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MRPC 1.6 (Confidentiality of Info.)/ Va. RPC 1.6 (Confidentiality of Information)

See Section I.A above.

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IV. CLIENT AUTHORITY

A final ethical issue that attorneys should keep in mind is the need to keep the proper balance between the allocation of authority between client and lawyer. "Zealous representation" may not be pursued to the exclusion of the attorney's obligation to allow the client to make decisions about the representation and provide the client with explanations to sufficiently inform the client as needed to make those decisions.

A. Line between Serving as Counselor and Making Decisions for Client

From time to time Courts see the effects of what appears to be unilateral decisions on the part of attorneys. In developing a litigation or settlement strategy, attorneys must apply the proper scope of representation. The Rules of Professional Conduct provide:

> MRPC 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer)
>
> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> . . . .

Comment [1] to the Model Rule notes that "Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by the legal representation, within the limits imposed by law and the lawyer's professional obligations."

> Va. RPC 1.2 (Scope of Representation)
>
> Scope of Representation
>
> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's

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> decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> . . .
>
> (d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

A situation may also arise where a client is not fully informed, such as to effect of relief requested in motion practice. This brings into focus an attorney's professional responsibility to explain matters to the extent necessary to permit the client to make informed decisions. The Rules of Professional Conduct provide:

> MRPC 1.4 (Communications)
>
> (a) A lawyer shall:
>
> > (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> >
> > (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> >
> > (3) keep the client reasonably informed about the status of the matter;
> >
> > (4) promptly comply with reasonable requests for information; and
> >
> > (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Va. RPC 1.4 (Communication)

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

As stated by the U.S. Bankruptcy Court for the Western District of Tennessee, "[a] number of bankruptcy court across the country have suspended attorneys for violations of a state's rules of professional responsibility." *In re Mills*, 2018 Bankr. LEXIS 2199 at *55-*56 (Bankr. W.D. Tenn. Jul 24, 2018) (collecting cases). The *Mills* Court further noted "[o]n appeal, courts have affirmed such decisions." *Id.* Bankruptcy Courts are not the only courts to impose such sanctions. For example, in an attorney disciplinary case, the U.S. District Court for the Eastern District of Washington found that a lawyer serving as debtor's counsel "failed to keep the Debtor properly informed about the status of her case and failed to obtain the Debtor's consent prior to taking actions on her behalf." *In re Jackson*, 2013 U.S. Dist. LEXIS 180528 (E.D. Wash. Nov. 18, 2013) at *3. The Court held that "[t]he above conduct violates [Washington] RPC 1.4, which requires an attorney to keep the client informed about the representation, and [Washington] RPC 1.2(f), which prohibits an attorney from acting for a client without authority." *Id.* at *3-*4.

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Faculty

Marc E. Albert is a partner with Stinson LLP in Washington, D.C., and chairs its Bankruptcy and Creditors' Rights Group. He has concentrated over the past 35 years in the areas of financial restructuring, insolvency and creditors' rights. Mr. Albert has represented debtors, creditor committees, lenders and other creditors. He has been appointed by the Office of the U.S. Trustee as operating trustee in chapter 11 and 7 cases, and he has been on the Chapter 7 Trustee Panel in the District of Columbia for over 30 years. He also serves as counsel in a variety of bankruptcy and nonbankruptcy matters, including representing numerous clients who have tax problems with the Internal Revenue Service or state tax authorities. Prior to joining the firm, Mr. Albert was litigation counsel with the Tax Division of the Department of Justice. With three other attorneys, he started a boutique bankruptcy law firm that grew to become one of the leading bankruptcy firms in Northern Virginia. Mr. Albert maintains an AV rating from Martindale-Hubbell and is admitted to practice in Pennsylvania, the District of Columbia, Maryland and Virginia, and before the U.S. Supreme Court. He is a member of the District of Columbia, American and Virginia Bar Associations, and the Walter Chandler Inn of Court, National Association of Bankruptcy Trustees, ABI, World Affairs Council – Washington, D.C., and the George Washington University Law School Mentoring and Recruitment Program. He was recognized in 2015 with the Founders Award from World Affairs Council and is listed in *The Best Lawyers in America* from 2011-17 for Bankruptcy and Creditor/Debtor Rights/ Insolvency and Reorganization Law and Litigation-Bankruptcy, *Washington D.C. Super Lawyers* from 2012-17 for Bankruptcy & Creditor/Debtor Rights, and the 2015 edition of *Chambers USA: America's Leading Lawyers for Business* in Bankruptcy/Restructuring. Mr. Albert received his B.A. in 1970 and his J.D. in 1973 from George Washington University, and his M.L.T. in 1984 from Georgetown University.

Hon. Kevin J. Carey is a partner in Hogan Lovells US LLP's Business Restructuring and Insolvency practice in Philadelphia and is a retired bankruptcy judge. He also is ABI's President and represents both companies and creditors in domestic and cross-border bankruptcy proceedings. Judge Carey was first appointed to the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in 2001, then in 2005 began service on the U.S. Bankruptcy Court for the District of Delaware (serving as chief judge from 2008-11). During that time, he authored more than 200 reported decisions, issued important rulings on key issues such as valuation, fiduciary duties and other complex chapter 11 and confirmation issues, and presided over such high-profile cases as Exide Technologies, Tribune Co. and New Century Financial. Judge Carey was the first judge to serve as global chair of the Turnaround Management Association and is an honorary member of the Turnaround, Restructuring and Distressed Investing Hall of Fame, as well as a Distinguished Fellow of the Association of Insolvency & Restructuring Advisors. In addition, he is a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute, as well as a contributing author to *Collier on Bankruptcy* and a member of the National Conference of Bankruptcy Judges. He also is a part-time adjunct professor in the LL.M. in Bankruptcy program at St. John's University School of Law in New York City. Judge Carey began his legal career in 1979 clerking for Bankruptcy Judge Thomas M. Twardowski, then served as clerk of court of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. He received his B.A. in 1976 from Pennsylvania State University and his J.D. in 1979 from Villanova University School of Law.

Hon. Rebecca B. Connelly is a U.S. Bankruptcy Judge for the Western District of Virginia in Harrisonburg, appointed in July 2012. She is a former standing chapter 13 trustee and chapter 12 trustee for the Western District of Virginia. Judge Connelly has been a member of ABI since 1994 and has served as a contributing editor and a features author for the *ABI Journal*, a member of the Consumer Bankruptcy Committee, and a speaker at ABI's Annual Spring Meeting and Winter Leadership Conference, "Eye on Bankruptcy" program and Views from the Bench. She also serves on the board of CARE and was an adjunct professor of law at Washington and Lee University School of Law. Judge Connelly was appointed to the Judicial Conference Advisory Committee on Bankruptcy Rules, for which she chairs its Consumer Subcommittee, is a member of its Cross-Border Insolvency Subcommittee and acts as its Bankruptcy Committee liaison. She received her B.A. in 1985 from the University of Maryland and her J.D. in 1988 from Washington & Lee University School of Law.

Hon. Rosemary J. Gambardella was sworn in as a U.S. Bankruptcy Judge on May 3, 1985, in the District of New Jersey in Newark, becoming the first woman to serve on its bankruptcy court. From 1980-85, she was senior staff counsel to Hugh M. Leonard, then U.S. Trustee for the Districts of New Jersey and Delaware. Judge Gambardella served as Chief Judge of the U.S. Bankruptcy Court for the District of New Jersey from Aug. 12, 1998, to Aug. 11, 2005. She is a member of the Lawyers Advisory Committee of the U.S. Bankruptcy Court for the District of New Jersey, a member and former president of the New Jersey Bankruptcy Inn of Court, and a member of the Bankruptcy Committee of the Third Circuit Task Force on Equal Treatment in the Courts - Gender Commission. In addition, she is a member of the National Association of Women Judges, the National Conference of Bankruptcy Judges, ABI and the Turnaround Management Association, and is a former member of the Bankruptcy Judges Advisory Group for the Administrative Office of the U.S. Courts. Judge Gambardella was the bankruptcy judge representative to the Judicial Conference of the United States (2009-11) and is a Fellow of the American College of Bankruptcy. She received the Rutgers School of Law – Newark Distinguished Alumni Award in 2012, the New York Institute of Credit Women's Division Judge Cecelia H. Goetz Award, the William J. Brennan, Jr. Award in 2013 and the Conrad B. Duberstein Memorial Award in 2015. Judge Gambardella earned her B.A. in history in 1976 from Rutgers University, where she was elected to Phi Beta Kappa. After receiving her J.D. from Rutgers Law School-Newark in 1979, Judge Gambardella served as law clerk to the late Chief Bankruptcy Judge Vincent J. Commisa from 1979-80.

Hon. Elizabeth L. Gunn is a U.S. Bankruptcy Judge for the District of Columbia in Washington, D.C., appointed on Sept. 4, 2020. A COVID-era selection and appointment, she was sworn in by Zoom from her living room. Prior to her appointment, Judge Gunn served as an Assistant Attorney General for the Commonwealth of Virginia as the sole the bankruptcy specialist for the Division of Child Support Enforcement. She also practiced law in Richmond, Va., at Sands Anderson PC and McGuireWoods LLP. In 2017, Judge Gunn was honored as a member of ABI's inaugural class of "40 Under 40." She serves on the advisory board of the *American Bankruptcy Law Journal* and the board of the Federal Bar Association Bankruptcy Section, and she is a former board member of the International Women's Insolvency & Restructuring Confederation, a former committee chair of ABI's Consumer Bankruptcy and Litigation Committees, and an associate editor of the *ABI Journal*. Judge Gunn is a member of the Walter Chandler Bankruptcy Inn of Court and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. She received her B.A. *cum laude* from Willamette University and her J.D. *cum laude* from Boston College Law School.

Hon. Laurel M. Isicoff is Chief Judge for the U.S. Bankruptcy Court for the Southern District of Florida in Miami, initially appointed on Feb. 13, 2006, and named chief judge on Oct. 1, 2016. She serves on the Judicial Conference Committee on the Administration of the Bankruptcy System. Judge Isicoff is a member of the *Pro Bono* Committee of the American College of Bankruptcy and is the immediate past chair of its Judicial Outreach Committee. She also currently serves as judicial chair of the *Pro Bono* Committee of the Business Law Section of the Florida Bar and is a member of the Florida Bar Standing Committee on *Pro Bono*. Prior to becoming a judge, Judge Isicoff specialized in commercial bankruptcy, foreclosure and workout matters both as a transactional attorney and litigator for 14 years with the law firm of Kozyak Tropin & Throckmorton, after practicing for eight years with Squire, Sanders & Dempsey, now known as Squire Patton Boggs. In private practice, she also developed a specialty in SEC receiverships involving Ponzi schemes. Following law school, Judge Isicoff clerked for Hon. Daniel S. Pearson at the Florida Third District Court of Appeals before entering private practice. She is a past president of the National Conference of Bankruptcy Judges and of the Bankruptcy Bar Association (BBA) of the Southern District of Florida, and, until she took the bench, chaired the BBA's *Pro Bono* Task Force. Judge Isicoff speaks extensively on bankruptcy around the country, and is committed to increasing *pro bono* service, diversity in the bankruptcy community and financial literacy. She received her J.D. from the University of Miami School of Law in 1982.