Ethics Keynote Presentation: "Honor the Profession"

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Jaffe Raitt Heuer & Weiss; Southfield, Mich.

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Ethics Keynote Presentation:

"Honor the Profession"

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"Honor the Profession"

Introduction:

What is the meaning of "honor?"

According to Webster's Seventh New Collegiate Dictionary (1965), the word "honor" means:

- A good name or public esteem, reputation
- Outward respect, recognition, praise
- Privilege
- A person of superior standing
- One whose worth brings respect and fame or credit to one's profession
- A keen sense of ethical conduct, integrity
- One's word given as a guarantee of performance
- To live up to and fulfill the terms of

Too often, lawyers lose sight of the fact that they are professionals for whom the public looks to, not only for advice and guidance, but also as persons who are expected to conduct themselves with the highest of ethics and, yes, with "honor."

Whether it be due to the exigencies of the particular situation, the lack of time, the pressures of the practice, a lack of understanding or appreciation of the ethical components associated with a case or an issue in a case, the unrealistic demands of a client or simply the failure to think or care about the ethical implications of the particular action being taken, does not negate the importance of each of us asking at the front end, even though certain action can be taken, whether we should take it, particularly when resources are often times lacking in the bankruptcy arena. Nevertheless, how do you reconcile doing the "honorable thing" when, and if, resources are lacking or available?

Over the last two (2) years, the American Bankruptcy Institute ("ABI") formed two (2) task forces (the "Task Forces") devoted to heightening the ethical standards for bankruptcy practitioners. Two formal reports were issued – The National Ethics Task Force, that I chaired, issued its Final Report on April 21, 2013, and The Standards of Professional Courtesy and Conduct Task Force, chaired by James Patrick Shea, issued its Final Report in August 2013 (collectively, the "Final Reports"). While each of these Final Reports go a long way in educating the bankruptcy community about appropriate ethical standards to be employed by bankruptcy practitioners, we still continue to see too many instances of "unethical behavior" being displayed by practitioners that bring "dishonor," rather than "honor," to the profession.

The American Bar Association ("ABA") promulgated the Model Rules of Professional Conduct (the "Model Rules") and each state in which we practice has rules of professional responsibility that mandate the ethical precepts with which each lawyer must comply. In an article entitled

"The Lawyers' Race to the Bottom," written by Lincoln Caplan and published by the New York Times on August 6, 1983, the author suggested that some of the ethical duties – such as the responsibility to zealously represent one's client, (ABA, Model Rule 1.3, Comment 1) – colored the ethical regime being employed by professionals. Mr. Caplan stated:

> "In the old model of legal ethics, the lawyer's duty to represent a client zealously was tempered by his responsibility to do so "within the bounds of the law." It was assumed that those bounds could be identified. Now that much of the law is seen as vague and changeable, the duty of zealous advocacy seems to overwhelm lawyers' sense of responsibility to operate within legal bounds, in part because the bounds don't amount to much when the law is so variable.
>
> Even lawyers known for care and caution feel obliged to test the limits of propriety in the name of professional duty. As Professor Gordon of Stanford Law School said, "The lawyer under such an ethical regime is by vocation someone who helps clients find ways around the law," although the outcome may be unsavory."

I realize that we have the duty to zealously represent our clients but it is also important that we do so within the bounds of the ethical precepts that govern the profession.

I hope that by illustrating some of the instances in which inappropriate or unethical conduct has been found by the courts and others that I can heighten your awareness and sensitivity to these issues and, ultimately, instill "a higher sense of honor to the profession."

Sampling of Recent Cases:

- **Failure to meet and confer over discovery disputes in which sanctions awarded against attorney and client:**

  In *New Products Corporation. v. Tibble (In re Modern Plastics Corporation)*, 2015 WL 4498023 (Bankr. W.D. Mich. July 23, 2015), Judge Dales issued sanctions against plaintiff's counsel and plaintiff in an amount approximating $165,000.00 under Rules 37(a)(5) and 45(d)(2) of the Federal Rules of Civil Procedure (applicable in adversary proceedings) for failing to "meet and confer over discovery" issued by plaintiff after party subject to discovery asserted objections to the discovery as being overbroad. Counsel asked plaintiff's counsel to "meet and confer" to attempt to resolve the objections and limit the burdens imposed by the discovery. Plaintiff's counsel failed and refused to meet and, instead, issued additional discovery through subpoenas to third parties that involved, among other things, ESI and the retention of a third party ESI vendor to assess and assist in responding to the subject discovery.

In describing the burdens associated with this discovery dispute, the Court indicated:

> "Nevertheless, heedless of these obvious burdens, Mr. Demorest issued subpoenas, as an officer of the court, that required a global banking giant and a national law firm -- neither a party to the litigation – to produce documents involving their clients in thirty-six categories, covering a decade, within a fortnight – spanning the Labor Day holiday."

The Court further stated:

> "Moreover, the court perceived not even a whiff of justification for the conduct of New Products or its counsel, in terms of avoiding undue burden resulting from the subpoenas, let alone a "substantial" justification, during the two hearings the court held in connection with the discovery dispute."

A motion for reconsideration and a stay was filed and denied on August 26, 2015. The decision is now on appeal.

The lesson of this case is: be reasonable and responsive, play nice and remember that the court may review your conduct.

- **California Ethics Opinion on duty and responsibility of counsel to deal with ESI, Formal Opinion No. 2015-193 (June 2015):**

The Model Rules of Professional Conduct require, among other things, a duty of competence. *See* Model Rule 1.1. This rule requires an attorney to assess at the outset of each engagement what electronic discovery issues, if any, might arise, including the likelihood that e-discovery will or should be sought by either side. If it is likely that e-discovery will be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation.

In addressing potential e-discovery issues, and in recognition of the increasing use of electronic communications, counsel is strongly encouraged to consider and to address the following:

1. Initially assess e-discovery needs and issues, if any;

2. Implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence, like electronic information, potentially relevant to the issues raised in the litigation (*i.e.*, the imposition of a "litigation hold") ;

3. Analyze and understand a client's ESI systems and storage;

4. Identify custodians of relevant ESI;

5. Perform appropriate searches;

6. Collect responsive ESI in a manner that preserves the integrity of the ESI;

7. Advise the client about available options for collection and preservation of ESI;

8. Engage in competent and meaningful "meet and confer" with opposing counsel concerning an e-discovery plan; and

9. Produce responsive ESI in a recognized and appropriate manner.

See e.g., Pension Committee of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F.Supp.2d 456, 462-465.

If an attorney lacks the skills and/or resources to address ESI, the attorney should take sufficient steps to acquire sufficient learning and skill, or associate or consult with someone with appropriate expertise to assist or advise the client to retain an IT expert to assist with the technical issues. Failure to do so may result in a finding that the attorney has breached his duty of competence to the client, as well as the issuance of potential sanctions for spoliation.

In this case, the attorney failed to:

(i) Make an assessment of the case's e-discovery need or of his own capability;

(ii) Did not consult with an e-discovery expert prior to agreeing to an ediscovery plan at the initial case management conference;

(iii) Allowed a discovery proposal to become a court order with no expert consultation and, under circumstances, where he lacked sufficient expertise;

(iv) Participated in preparing joint ediscovery search terms, without experience or expert consultation, and did not recognize the danger of overbreath in the agreed upon search terms;

(v) Stipulated to a court order directing a search of the client's network by the other side, without having first understood what was on the system;

(vi) Did not instruct nor supervise the client before allowing the other side's vendor to have direct access to the client's network;

(vii) Did not try to pre-test the agreed upon search terms or otherwise review the data before the network search, and instead relied on his assumption that the client's IT department would know what to do and on the parties' claw-back agreement protecting inadvertently released privileged information;

(viii) Took no action to review the gathered data until opposing counsel asserted spoliation and threatened sanctions;

(ix) Then unsuccessfully attempted to review the search results; and

(x) Damage was done as sensitive, proprietary and privileged material released and not due to inadvertence (*i.e.*, in the context of reasonable steps having been taken to prevent disclosure in the first instance), but rather based on no guidance or instructions having been provided or any evaluation having been conducted.

The "claw-back" provision in the joint discovery agreement did not protect the attorney in this case because the disclosure of the sensitive, confidential information was not due to "inadvertent disclosure" because counsel has taken no action to protect the disclosure of such information.

The lesson of this case is: be competent and stay abreast of changing technology.

- **Standard for Evaluating Fee Applications:** Two recent rulings by Texas bankruptcy courts in *In re Digerati Technologies, Inc.*, 2015 WL 5053555 (Bankr. S.D. Tex. August 21, 2015) and *Barron & Newburger PC v. Texas Skyline (In re Woerner)*, 783 F.3d 266 (5th Cir. 2015), in which the court rejected the 17-year-old, highly criticized holding of *Matter of Pro-Snax Distributors, Inc.*, 157 F.3d 414 (5th Cir. 1998), in terms of the approach that the courts should utilize in evaluating fee applications. Prior to this ruling, the Fifth Circuit had reviewed fees incurred by a professional retrospectively based on the actual benefits received from the services provided, as opposed to the reasonableness of the fees at the time that the fees were incurred. The law is the Fifth Circuit Court of Appeals in now a prospective approach, as opposed to the "identifiable, tangible, material benefit" retrospective standard, based on the plain language if Section 330 of the

Bankruptcy Code. While these decisions were decided in the context of chapter 11 cases, the rulings of the court are equally applicable in chapter 13 cases.

In *In re Digerati Technologies, Inc.*, 2015 WL 5053555 (Bankr. S.D. Tex. August 21, 2015), in a case involving a 100% dividend to unsecured creditors, the bankruptcy court reduced counsel's fees by 26% based on such fees neither being necessary to the case administration nor reasonably likely to benefit the estate at the time that they were performed. The deductions made by the court related to unsuccessful motions seeking post-petition financing in which the court characterized applicant's courtroom performance at the hearing as being "woeful," or stated differently, "the attempt to obtain financing was not a good gamble given the poor preparation and paucity of relevant and convincing testimony that applicant adduced at the hearing." The court also reduced applicant's time associated with an emergency motion to extend deadline to provide proof of filing of its 2012 tax return as being unnecessary to the case administration and not likely to benefit the estate at the time the services were performed. The court specifically found that the applicant "did not do a good job" at the hearing to adduce testimony to establish cause existed to extend the deadline and, thus, it was not a "good gamble." The court also reduced time associated with attempting to confirm an unconfirmable plan that proposed the appointment of officers and directors of the reorganized debtor at "exorbitant compensation packages" (not even understood by the principals) as not being consistent with public policy. Finally, the court reduced fees of applicant based on its failure to disclose its prior attorney-client relationship with an investment bank and "counsel's 'slavish' regard for the interests of the officers of the debtor, as opposed to the debtor entity. This case also raises the question of who is the client and to whom do you owe your fiduciary duty, an issue addressed in the Final Report of the National Ethics Task Force.

In *Barron & Newburger PC v. Texas Skyline (In re Woerner)*, 783 F.3d 266 (5th Cir. 2015), the court disallowed certain fees based on the lack of likelihood of success of the legal strategy at the time the fees were incurred. In making this ruling, the court stated that Sections 327 through 330 of the Bankruptcy Code "explicitly contemplate[ ] compensation for attorneys where services were reasonable when rendered . . . but ultimately fail to produce an actual, material benefit." Moreover, the court found this interpretation to be consistent with the legislative history surrounding the adoption of the Bankruptcy Code. The court indicated that Congress had considered and rejected an "actual benefit" test at the time that the Code was enacted. Various fees had been incurred on discovery in connection with a motion to convert that was filed in the case. Because the court

> found that "there was not a reasonable likelihood of success in reaching confirmation or avoiding conversion to chapter 7 at the time that the services were rendered" based, among other things, lack of creditor support for a chapter 11 plan, the fees sought by applicant for such services were denied. The court also denied fees sought by applicant in connection with amending the schedules and statement of financial affairs associated with applicant's verification that all of debtor's assets had been accounted for, finding that "[n]either the creditors or the estate should have to bear the additional expense [attributable to Debtor's conduct]."
>
> *See also*, Hage, Paul R., *Benchnotes*, American Bankruptcy Institute Journal, Vol. XXXIV, No. 8, pg. 6 (August 2015).

These new decisions appear to represent a positive change in the Fifth Circuit as they bring the state of the law as relates to the standard governing review of fee applications of professionals in line with all the other circuits. The reversal of the *Pro-Snax* decision – which applied a retrospective, as opposed to a prospective, analysis – will result in less "second-guessing" of actions undertaken by counsel in a case that does not necessarily yield the anticipated and hoped-for results when counsel made the decision to proceed. Nevertheless, counsel must carefully assess and determine at the time that action is taken whether it is reasonable based on its belief then that the action can potentially confer a benefit on the estate.

Even if the client is insisting that counsel pursue a certain course of action and under circumstances where there is no issue of "informed consent," it does not excuse counsel's duty to determine whether the taking such action at that time is reasonable and likely to result in a benefit being obtained. *See also*, Rapoport, Nancy B., *"The Client Who Did Too Much,"* 47 Akron L.R. 121 (2014).

- **Excessive fees** sought by oversecured creditor under section 506(b) denied by Court in *In re William D. Parker, Jr. and Diana L. Parker*, 2015 WL 4747536 (Bankr. E.D.N.C. August 10, 2015):

  > Judge Humrickhouse denied attorneys' fees sought by oversecured creditor under section 506(b) based on the court finding that: (i) duplicative billing both within and between firms, (ii) multiple attorneys working on a single project and instances of double billing, (iii) fees attributable to "overlawyering," and (iv) charges for ministerial work (such as communicating with courtroom staff, printing and organizing exhibits, calendaring and filing pleadings, preparing certificates of service, requesting transcripts, *etc*.). In the course of making this

ruling, the court also observed and found relevant that the creditor's counsel had incurred fees that were more than one and a half times the fees incurred by the debtor.

- **Sanctions issued** against debtor's attorney under Fed.R.Bankr.P. 9011(b)(3) for making false certification that debtor had obtained credit counseling from a credit counseling agency approved by the United States Trustee.

  In *In re Camille D. Howe,* 2015 WL 4880862 (Bankr. D.D.C. August 14, 2015), in a chapter 13 case, Judge Teel sanctioned a debtor's counsel for making a false certification in the schedules indicating that the debtor had sought and obtained credit counseling prior to the filing of the petition from an agency approved by the U.S. Trustee. According to the court:

  > "The failure to examine the United States Trustee's website to determine whether the entity from which the debtor obtained counseling was a credit counseling agency approved by the United States Trustee necessarily means that there was not an inquiry that was reasonable under the circumstances regarding whether the debtor had obtained counseling from an agency approved by the United States Trustee."

  Moreover, the clerk of the court had issued an order listing in detail various deficiencies in the petition and directed the debtor to file an amended petition by a date certain, and warned that the petition may be stricken, if not corrected. The debtor's counsel took no steps to prevent the dismissal of the case or to address the notices issued by the clerk. Under these circumstances, the court had little difficulty in requiring the debtor's attorney to make the debtor whole with respect to the filing fees that the debtor had incurred in the case and, further requiring a disgorgement of fees paid by the debtor.

  While there may be pressures to cut corners, whether because of lack of resources, lack of cooperation of the client or the urgencies triggering the filing, cutting corners, as in this case, can result in the imposition of sanctions.

- **More Sanctions:** Court ordered disgorgement of all fees by chapter 11 debtor's counsel and further suspended counsel from practice of law in the district and revoked counsel's ECF privileges in *Needler v. Casamatta (In re Miller Automotive Group, Inc.)*, 2015 WL 4746246 (8th Cir. BAP July 12, 2015).

In this case, after U.S. Trustee received a written complaint from the debtor and the debtor's principal concerning the conduct of their counsel in connection with a chapter 11 case that had been dismissed, the U.S. Trustee sought and obtained a motion reopening the case under Section 350(b) of the Bankruptcy Code. After reopening the case, the court found "overwhelming evidence" that debtor's counsel committed numerous improper actions, misconduct and inactions that clearly supported the relief granted by the court that included the following:

(i) Filed chapter 11 on behalf of entity that did not exist and then failed to take action to correct the debtor's name after the U.S. Trustee brought it to his attention, thereby requiring the U.S. Trustee to file a motion to dismiss;

(ii) Failed to communicate accurate information to the debtor and its officers concerning the case and made potentially false and misleading representations to the debtor and its officers concerning the case;

(iii) Unsuccessful in obtaining authority for debtor to use cash collateral due to inadequate evidence to support the motion and under circumstances where he was found never to have advised the owners of the debtor what evidence was needed to obtain use of cash collateral and never reviewed projections of debtor for feasibility or accuracy;

(iv) Filed baseless motion to withdraw the reference that was quickly denied as classic "forum shopping" by the district court;

(v) Failed to file plan accompanied by a disclosure statement;

(vi) No evidence that counsel made any attempt to secure floor plan financing for debtor to continue in business (*i.e.*, a lack of prefiling preparation and planning);

(vii) Unsuccessful in retaining broker to attempt to sell debtor's business and failed to disclose in application the significant business relationship between counsel and broker and, after U.S. Trustee objected, the application was withdrawn;

(viii) Allowed two primary creditors to obtain relief from the automatic stay;

(ix) Filed state court action after chapter 11 case was dismissed against debtor and debtor's principals for attorneys' fees in excess of amount that he had previously advised debtor was incurred;

(x) Failed to adequately disclose the true source of his retainer for which he had been admonished by a bankruptcy court in another case for the same infraction;

(xi) Did not enter into a written fee agreement with debtor and engaged in bad faith by seeking fees far in excess of the amount he quoted;

(xii) Never sought nor obtained approval of any attorneys' fees or expenses until case reopened and ordered to file fee application by court;

(xiii) Took detrimental actions to the debtor and the estate from the beginning and caused debtor to incur unnecessary legal fees;

(xiv) Should have recognized from the beginning that there was no reasonable likelihood of a successful reorganization for the debtor due to its operational struggles, low inventory and inability to obtain financing;

(xv) Failed to inform client about the pleadings filed, responses thereto or to obtain client's input and authorization before filing pleadings;

(xvi) Failed to perform reasonable investigation into the facts contained in the petition and other pleadings without conducting due diligence;

(xvii) Failed to comply with local rules pertaining to electronic filing, including the failure to obtain and retain original signatures of debtor's representative on filings in the case; and

(xviii) Interactions with debtor's representatives were found to be "deplorable" and described as acting like a "bully."

Moreover, "[t]he bankruptcy court's search of published opinions revealed numerous other cases (the court listed eight such cases) that "revealed a pattern of professional misconduct, procedural non-compliance, and ethical violations" by [counsel]." It is little wonder under these facts and circumstances that the BAP affirmed the award of sanctions against counsel under its inherent authority under Section 105(a) and Bankruptcy Rule 9011.

Counsel also challenged, on appeal, the reopening of the cases under Section 350(b) contending that a closed case that was dismissed prior to being fully administered cannot be reopened, and thus argued that the court did not have jurisdiction to address the issues or to award sanctions. To support this contention, counsel relied on other two cases in which the court had denied such motions filed by debtors that were found to be attempting to enforce rights that no longer existed by virtue of the dismissal (*i.e.*, to proceed with chapter 13 case or regain possession of property or obtain their discharge). In rejecting these arguments, the court noted that the motion to reopen in this case had been filed by the U.S. Trustee, thereby distinguishing it from the cases relied on by counsel. The court also negated and dismissed counsel's contentions that reopening the case required "notice, opportunity and a hearing" (which only apply when a debtor is seeking to reopen a case, not applicable here) or retention of jurisdiction by the court, as not being supported by applicable law. Finally, the court found that the list of bases in the local rule supporting the reopening of a case were merely exemplary and not exclusive.

The "watch words" and "lessons" of this case are: investigation, competence and communication. Moreover, you would be well advised to hire separate counsel in the district that is wise, experienced and cloaked with credibility in the local court when faced with objections from the U.S. Trustee.

- **New Ruling by Seventh Circuit Court of Appeals on the Scope of the Duty to Advise a Client Regarding Structure of Transaction and Risks Attendant Thereto:**

In *Peterson v. Katten Muchin Rosenman LLP*, 792 F3d 789 (7th Cir. July 7, 2015), Judge Easterbrook issued a decision in the continuing saga of the Petters case, in which he reversed the ruling of the District Court that had dismissed a complaint filed by the chapter 7 trustee against the law firm under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief may be granted. The chapter 7 trustee had sued the law firm for failing to fully and adequately advise its client about the potential structures associated with the proposed transaction and the risks associated therewith at two separate time periods and contended that these failures constituted legal malpractice. The chapter 7 trustee contended that the law firm had a duty to advise the client at two specific times – when the transaction was first proposed in 2003 and, second, in 2007 when Petters fell behind in payments to the lockbox and the client contacted the law firm for advice.

The District Court had ruled that the Funds – the client of the law firm – knowingly took a risk and could not blame the law firm for failing to give business advice. In reversing the lower court ruling, Judge Easterbrook noted that the District Court had erred in three

specific ways in making its ruling. First, instead of taking the complaint on its own terms, the District Court analyzed the complaint based, among other things, various narratives of the law firm, alleged facts that were extrinsic to the complaint, which was not appropriate in the context of a Rule 12(b)(6) motion. Second, the District Court failed to engage the complaint's main contention - the duty that the law firm had to alert its client to the risk of allowing repayments to be routed through Petters and drafting and negotiating any additional contracts necessary to contain that risk. According to Judge Easterbrook:

> "A competent transactions lawyer should have appreciated that the former arrangement offers much better security than the later and alerted its client. If a client rejects that advice, the lawyer does not need to badger the client; but [here] the complaint alleges that the advice was not offered, leaving the client in the dark about the degree of the risk it was taking."

The third problem identified by Judge Easterbrook with the District Court ruling was that the court did not identify any principle of Illinois law that sharply distinguished between business advice and legal advice. In addressing this issue, Judge Easterbrook stated:

> "It is hard to see how any such bright line could exist, since one function of a transactions lawyer is to counsel the client how different legal structures carry different levels of risk, and then to draft and negotiate contracts that protect the client's interest. A client can make a business decision about how much risk to take; the lawyer must accept and implement that decision. . . . Knowing degrees of risk presented by different legal structures, a client *then* can make a business decision; but it takes a competent lawyer, who understands how the law of secured transactions work (and who knows what's normal in the world of commercial factoring that Petters claimed to practice), to ensure that the client knows which legal devices are available and how they affect risks."

The Court did acknowledge, however, as part of its ruling that a lawyer is not a business consultant. "But within the scope of the engagement a lawyer must tell the client which different forms are available to carry out the client's business, and how (if at all) the risks of that business differ with the different legal forms." The Court also recognized that the needs and sophistication of the client may impact the duty and the nature of the scope of the lawyer's duty, potential defenses that may be asserted by the law firm and whether any neglect on its part caused injury. But, at least, at this point, the Court has cleared the way for the complaint to proceed. Note, even though this case arose in a business/commercial context, the lack of resources in the consumer area make it more likely that counsel may serve as both a legal and business advisor.

- **Ghostwriting** – providing drafting assistance to a *pro se* litigant without disclosing the lawyer's identity to the court by signing a the pleading or entering an appearance:

  In *FIA Card Serv., N.A. v. Pichette*, 116 A.3d 770, 2015 BL 179706, R.I. N0. 20120272-Appeal (June 8, 2015), Chief Justice Paul A. Suttell, of the Rhode Island Supreme Court, held that lawyers did not violate Rule 11 or professional conduct standards by ghostwriting pleadings for *pro se* litigants, thereby vacating prior sanctions that has been issued against counsel. However, the court also ruled that to undertake such ghostwriting, counsel must obtain the client's written consent to the limited scope representation, must sign the filings and disclose how much help they gave to the client in the filing, even if counsel is not entering an appearance in the case, thereby ending the practice of hidden legal assistance in Rhode Island.

  In making this ruling, the Court noted that '[t]he plain language of Rule 11 does not implicate ghostwriting because it does not address the author or drafter of the documents," [but] "instead , the linchpin of Rule 11 is its signature requirement." By permitting this practice with full disclosure of the attorney's limited involvement, the Court acknowledged that it was allowing attorneys to provide limited-scope representation that yields greater access to justice for *pro se* litigants who are forced to choose between no contact with an attorney versus some degree of a limited attorney-client relationship. Query, whether these requirements that mandate that the ghostwriter sign the pleadings brings Rule 11 into play? Note, however, that all states do not permit ghostwriting under the circumstances identified by the Rhode Island Supreme Court in this case.

  In *Persels & Associates, LLC, et al v. Capital One Bank (USA) N.A., et al.*, 2014 WL 585629 (Ky. Ct. App. February 14, 2014), Kentucky lawyers who were retained on a limited scope basis by primary counsel, Persels & Associates, LLC ("Persel"), a national firm engaged primarily in unsecured debt collection, who prepared pleadings for Persel's debt collection clients, were held to have violated Kentucky's Rule 11 by going along with its instruction not to sign the pleadings or to enter an appearance in the cases, finding that Rule 11 requires that pleadings must be signed by attorneys who prepare them – to enter into a contract that provides otherwise is illegal. In so ruling, the court dismissed arguments that permitting such practice assured access to the courts for indigent individuals. According to the court:

  > "The rationale behind Rule 11 is to regulate the litigation process so that pleadings are valid for everyone – indigent or not. . . . *pro se* clients, indigent or not, must follow the rules of civil procedure too."

Finally, as part of this ruling, the court suggested that limited representation through unbundled services in Kentucky was not authorized and would necessitate further review and consideration of the rules of practice and possible amendments thereto.

- **Failure to Register for ECF Notification:** In *In re Lezell,* 2015 WL 4331889 (Bankr. D.D.C. July 15, 2015), counsel filed a motion requesting the court to "reopen" the court's order of dismissal that had been entered over two months ago dismissing the case, as well as a judgment awarding fees and expenses to debtor. Counsel alleged that he did not receive email notification of the documents. However, the court pointed out that because counsel had filed pleadings in paper form and was not a registered e-filer in the court, he was not entitled to e-mail notification of orders. Counsel also contended that his office did not receive the mailed copies of the documents. However, the court noted that the docket included certificates of mailing showing that the subject documents had been mailed to him at his address of record and, thus, his non-receipt of the documents did not demonstrate that the documents were not mailed. Moreover, Federal Rule of Bankruptcy Procedure 9022(a) provides that lack of notice of entry of an order or judgment "does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002." Thus, to grant the relief sought by counsel in this case would violate Rule 9022(a). Finally, counsel filed an affidavit of one of his employees to support the lack of notice to attempt to sway the court. The affidavit was rejected by the court as providing a basis to grant the relief sought as the court indicated that "[counsel] should have been monitoring the docket via his PACER account."

- **More Sanctions for Unauthorized Filing of Petition; *In re TH*, 529 B.R. 112 (Bankr. E.D. Va. March 18, 2015):**

  Court found that attorney violated bankruptcy Rule 9011 and multiple state rules of professional conduct by electronically filing a petition without first obtaining the client's authorization to do so. Counsel was unable to produce a wet signature on the petition and this resulted in a conclusive presumption by the court that no signature existed. Moreover, according to the court, the alleged "exigent circumstances" for the filing – that were disputed by the client – did not justify the attorney's disregard of his duties of care and due diligence in failing to make a reasonable inquiry into the client' personal and financial circumstances before filing the petition.

The court also found that the law firm had failed to have a policy in place to ensure that any attorney filing a bankruptcy petition had the requisite certificate of credit counseling in hand prior to filing the petition.

The court further stated in addressing the firm's practices and conduct:

> "In addition to its troubling policies and practices, the Boardman firm's treatment of T.H. post-filing and the reaction to her visit in March 2014 [are] unacceptable to this Court. The Boardman Firm failed to properly follow-up with T.H. following the filing of the Petition. The Court is not satisfied that Zooberg and the Boardman Firm put forth a sufficient good faith effort to contact T.H. to complete any of the required actions in her case following her initial visit to the office. Moreover, the Boardman Firm's reaction and reception towards T.H. when she visited their office upon discovering the filing that she did not authorize was obstinate and wholly unprofessional. The Court accepts T.H.'s testimony that the reception was a hostile one. The accusatory tone of Zooberg's letter to the U.S. Trustee supports this conclusion. . . . It is unacceptable to this Court for the Boardman Firm to treat T.H. in such a disrespectful manner when she was seeking assistance in removing the unwanted bankruptcy filing from her record."

With this kind of conduct and the factual findings made by the court, it is little wonder that the court issued sanctions in this case, which included: (i) the attorney was suspended from the practice of law for 60 days; and (ii) the attorney and the law firm was held jointly and severally liable to the alleged client for a $1,000 fine, which represented the disgorgement of the fee that had been paid by a third party for filing the Petition in this case.

- **Virginia State Bar, Ethics and Professional Responsibility Committee, Opinion, LEO 1883 (July 27, 2015)**. The Committee issued this opinion to provide guidance to attorneys who face the conflict between the ethical obligation to maintain unearned legal fees advanced by a client in an attorney trust account and the application of bankruptcy law which would render the fees in trust an asset of the petitioner's bankruptcy estate and unavailable to the attorney or the client at the time a chapter 7 petition is filed. The State Bar Committee permitted a debtor's attorney to withdraw from his trust account the balance of his client's advance of a fixed legal fee immediately before filing the client's chapter 7 petition in bankruptcy when there remain post-petition legal services that are incomplete or have yet to be performed or when substantial post-petition legal services are involved. In making this ruling, the Committee indicated that the opinion did not

address, nor was it intended to apply to those instances in which legal fees for a bankruptcy were paid by a third party.

In issuing this opinion, the Committee acknowledged the ruling of the United States Supreme Court in *Lamie v. United States Trustee*, 540 U.S. 526 (2004) that held unless the debtor's attorney has been hired by the bankruptcy trustee in a chapter 7 case, the debtor cannot be paid from the assets of the bankruptcy case. The Committee also took into consideration, as part of its ruling, information provided by the National Association of Bankruptcy Trustees that in approximately 90% of chapter 7 cases there are no assets available for liquidation, either because they are exempt or liened by secured creditors. Moreover, the fixed fee taken by counsel are intended to cover both pre-petition and post-petition legal services which end when the client obtains its discharge. In authorizing the withdrawal of the fee pre-petition, the Committee indicated that neither the substantive bankruptcy law or bankruptcy rules of procedure addressed how an advanced, fixed fee must be handled.

After reviewing the tasks that the fixed fee was intended to cover, the fact that most of the services had already been performed before the petition was filed and negation of the conflict that would exist if the outstanding indebtedness had to be disclosed on the petition, the Committee permitted the payment of the fees prior to the filing. Finally, in approving this arrangement, the Committee noted that the client is protected in the event that the lawyer fails to perform post-petition fully and competently because the bankruptcy court may order disgorgement of excessive fees and refund them to the client.

- **New Opinion issued by Professional Ethics Committee of New York Bar Association: on Local Counsel Duties (June 23, 2015):**

  The Committee recommended that lawyers acting as local counsel enter into written limited scope engagements that limit the role of local counsel to manage expectations, avoid misunderstandings about the scope of the lawyer's responsibilities, minimizes disputes over the allocation of responsibility between lead counsel and local counsel and manage costs.

  According to the Committee, it is the attorney's obligation to communicate any limits on the scope of representation to the client and any limitations on the scope of representation must be reasonable under the circumstances and the client must give informed consent. Local counsel must also comply with any relevant court rules governing the responsibilities of counsel.

Conclusion:

Monroe H. Freedman, one of the dominant figures in legal ethics, whose work has helped to chart the course of lawyers' behavior in the late 20th Century, died earlier this year. He was 86 years old and was a professor of law at Hofstra University on Long Island, New York. According to a New York Times article published on March 3, 2015, Alan Dershowitz, the Harvard Law School professor, was quoted in talking about Freedman as follows:

> "He invented legal ethics as a serious academic subject. . . .Prior to Freedman, legal ethics was usually a lecture given by the dean of the law school, which resembled chapel: 'Thou shalt not steal. Thou shalt not be lazy.' But Monroe brought to the academy the realistic complexity of what lawyers actually face."

Freedman's book, "Understanding Lawyers' Ethics," co-authored with Abbe Smith, is currently in its fourth edition and is assigned in law schools throughout the country.

While the practice of bankruptcy law from an ethics standpoint is certainly more complex than dealing with a two-party dispute, in addition to reviewing and understanding the Final Reports of the two ABI Task Forces, keeping abreast of new developments, and reflecting on and asking the tough questions, possibly it is time to go back and review one of the major resources on ethics – "Understanding Lawyers' Ethics" – to ensure that we "honor the profession" in the work that we perform, consistent with the principles espoused by Monroe Freedman.

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