AMERICAN BANKRUPTCY INSTITUTE

Rocky Mountain Bankruptcy Conference

Fireside Chat with Retiring Judges

Hon. Michael E. Romero, Moderator
U.S. Bankruptcy Court (D. Colo.) | Denver

Hon. William T. Thurman, Appointed 2001
U.S. Bankruptcy Court (D. Utah) | Salt Lake City

Hon. Joel T. Marker, Appointed 2010
U.S. Bankruptcy Court (D. Utah) | Salt Lake City

Hon. Kevin R. Anderson, Appointed 2015
U.S. Bankruptcy Court (D. Utah) | Salt Lake City

2025

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Hon. William T. Thurman (2001), Hon. Joel T. Marker (2010), Hon. Kevin R. Anderson (2015)
Hon. Michael E. Romero, Moderator

Friday, June 13, 2025

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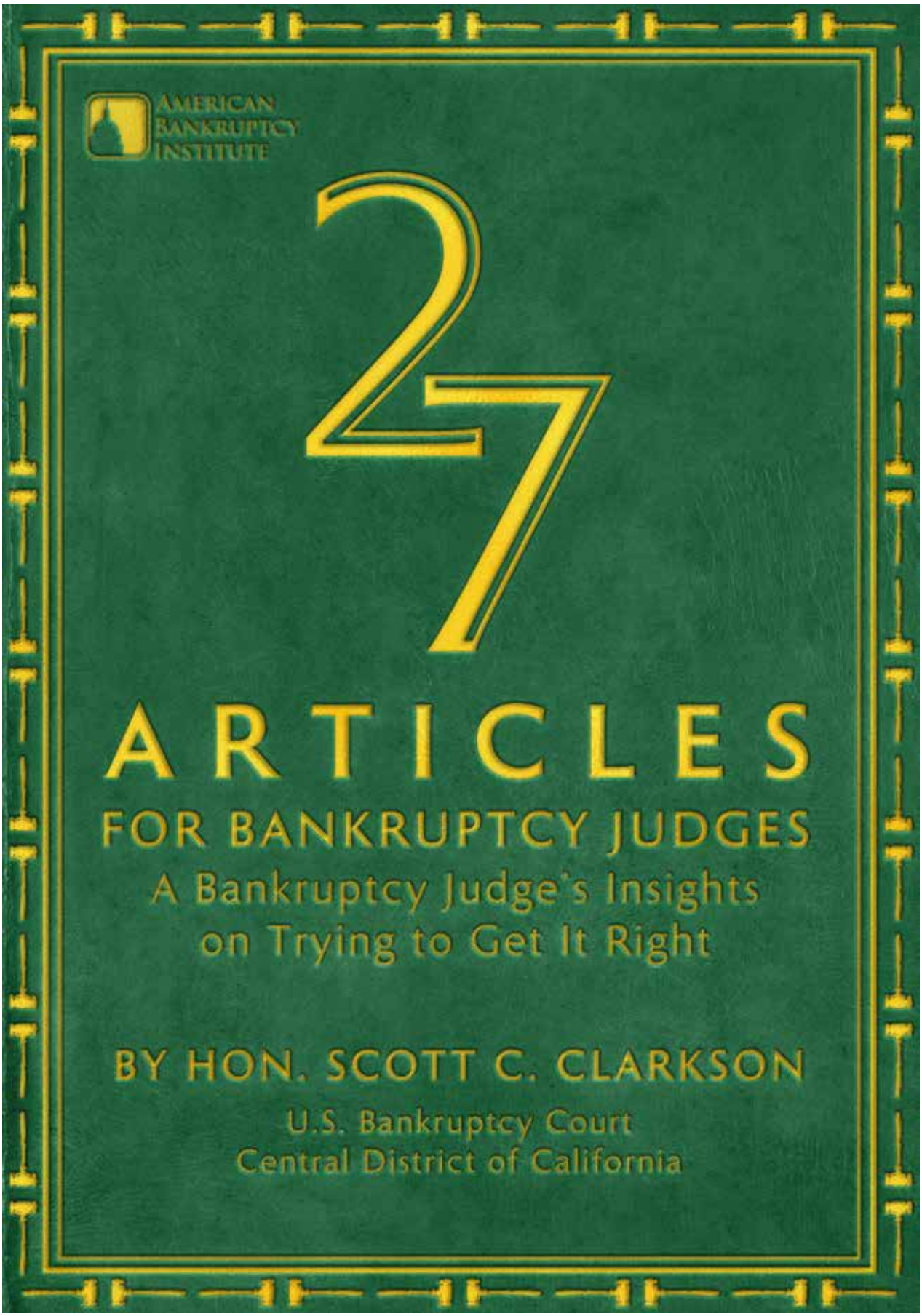
AMERICAN BANKRUPTCY INSTITUTE
27
ARTICLES
FOR BANKRUPTCY JUDGES
A Bankruptcy Judge's Insights on Trying to Get It Right
BY HON. SCOTT C. CLARKSON
U.S. Bankruptcy Court
Central District of California

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— From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.

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FOREWORD

S.C. Clarkson
January 2024

This project began on Christmas Day 2023 in Tangier, Morocco, and concluded in Cairo, Egypt, in January 2024. It was completed in the thirteenth year of my term as a bankruptcy judge, with almost a year to go before my first term's expiration, which is interesting only because that is the day before Inauguration Day 2025 in Washington, D.C. We'll see how that all turns out.

The title of this book borrows from T.E. Lawrence's effort, written in August 1917. Following his successful WWI command of the joint Arab forces of the Arabian desert against the Ottoman Empire forces in Aqaba, his military bosses in Cairo decided that because there was a legitimate possibility that Lawrence might not be long for the world, they ought to have him chronicle his knowledge, understanding and theories of working with very different people and cultures in trying times. While Lawrence initially refused to prepare notes, he finally came through with his *27 Articles*.[1]

I appreciated his writing and, like most who read Lawrence, completely understood his false modesty as he offered an explanation that none of his advice should be considered applicable to any other circumstances in world events. As I continued to digest his thoughts and insights, I came to believe that there are so many applications available to all of us.

Every bankruptcy judge attending their baby judge school (both phases 1 and 2!) finds fascinating the significant wisdom and knowledge provided by great judicial luminaries such as Judges Peter Bowie (S.D. Cal.), Ray Mullins (N.D. Ga.), Pamela Pepper (E.D. Wis., now a district judge) and Gregg Zive (D. Nev.). While very important matters of ethics, rules of law, judicial decision-making and internal cham-

1 Ironically, almost 90 years later, John Hulsman, a leading expert in foreign policy, was seated at a Bush White House briefing soon after 9/11, listening to the discussions of why and how to nation-build (*i.e.*, invade) Iraq. He described in a foreword to Lawrence's *27 Articles* how he was summarily dismissed from the working group after suggesting that there was something to be learned from Lawrence's experiences in the Middle East. He paraphrased Lawrence: "Do not try to do too much with your own hands. Better the Arabs do it tolerably than you do it perfectly. It is their war, and you are to help them, not win it for them." He describes how he was met with stony silence, and shortly thereafter disinvited from the rest of the party.

bers procedures were thankfully discussed, limited time and the spatial diversity of our new judges required that some very basic cultural and practical advice go missing. Further, our teachers knew that we would start absorbing this information as we went along. Of course, they understood that no size would ever fit all.

This work is not just for newly minted judges. The Federal Judicial Center and most circuits in the U.S. initiate performance reviews for judges in their fourth or fifth years of service and will also assist upon request anytime a judge asks.[2] Improvement should always be a goal, and the information gathered by new judges upon their appointment comes on fast and furious, with little time to assimilate it all. My hope is that this guide will be brought out on occasion to remind us all of some of the considerations we should keep in mind. Finally, any bankruptcy lawyer or law clerk reading this can be privy to some valuable insights into the mind of their judge.

I've prepared a set of alternative 27 articles: suggestions and obvious self-evident ideas on being a bankruptcy judge. Perhaps they will serve as prompts for further discussions for what I've missed and clearly got wrong. As Lawrence observed during his work with the 1917 forces, our own practicalities of judging are an artform and not a science. They are not necessarily applicable to others' systems of jurisprudential management. Obviously, these 27 articles are not applicable to any or all circumstances, and finally none is originally known by me. Almost every one of my colleagues knows these things inside and out, and I only transcribe it as a compendium. Let's think of this as a starting point.

2 For attorney readers, one of the concerns many judges have is that counsel who are solicited for judicial performance reviews don't have the time to respond, making the feedback provided limited. Anonymous or not (your choice), please take the time to thoughtfully provide your feedback. We truly want to hear from you.

ABOUT THE AUTHOR

Hon. Scott C. Clarkson is a U.S. Bankruptcy Judge for the Central District of California in Santa Ana and Riverside, appointed on Jan. 20, 2011, and has also sat *pro tem* on the Ninth Circuit Bankruptcy Appellate Panel. Prior to his appointment, Judge Clarkson practiced bankruptcy law and bankruptcy litigation for more than 20 years in Los Angeles, served as chair of the Los Angeles County Bar Association's Commercial Law and Bankruptcy Section from 2008-09, and served on the board of directors of the Los Angeles Bankruptcy Forum and the Los Angeles Financial Lawyers Conference. He also previously served as judicial chair of the California Bankruptcy Forum, on the advisory board of ABI's Bankruptcy Battleground West, and for the Association of Insolvency and Restructuring Advisors' National Conference. Judge Clarkson has served as co-chair of the Legislative Committee of the National Conference of Bankruptcy Judges and as an at-large member of NCBJ's Board of Governors, and he is currently a member of the ABI Task Force on Veterans and Servicemembers Affairs. He also has served on the board of directors of the Orange County Federal Bar Association and the Orange County Bankruptcy Forum. Judge Clarkson was admitted to the bars of Virginia, the District of Columbia and California. He was admitted to the bar of the U.S. Supreme Court in 1988.

Beginning in January 1977, Judge Clarkson was a legislative assistant to a U.S. Congressman serving on the Judiciary Committee of the U.S. House of Representatives, where he was a direct observer and participant in the drafting of the Bankruptcy Code of 1978. He also served on the first board of advisors for the *Norton Annual Survey of Bankruptcy Law* (1979). Judge Clarkson has served as a judicial mediator in various cases over the last 12 years, including Exide Technologies, Inc. (Delaware), Ruby's Diners (Los Angeles), Eagen Avenatti, LLC (Orange County) and the City of San Bernardino, California (San Bernardino). He also has presided over dozens of other judicial mediations over his career. Judge Clarkson received his undergraduate degree from Indiana University in Bloomington in 1979 and his J.D. from George Mason University School of Law in 1982, where he was a member and an editor of its law review.

ACKNOWLEDGMENTS

My deepest gratitude is extended to my remarkable friends who supported and contributed to these efforts. I am profoundly fortunate to be surrounded by a community of exceptional individuals who gave their time and encouragement to this project. I give special thanks to Bankruptcy Judge Robert D. Drain (S.D.N.Y., ret.), ABI Editor-at-Large Bill Rochelle, Prof. Nancy B. Rapoport (University of Nevada, Las Vegas William S. Boyd School of Law), Prof. Abigail B. Willie (St. Louis University School of Law) and Bankruptcy Judge Christopher M. Klein (E.D. Cal.) for their honest and unmerciful comments and stylistic editing, which were so appreciated. ABI Senior Editor Carolyn Kanon and all the other professionals at the American Bankruptcy Institute have been so kind and generous to me throughout my 25+ years of membership. I would also like to express my appreciation to ABI Executive Director Amy A. Quackenboss, Director of Communications James Carman and Graphic Designer Summer Cox for their assistance on this book.

I am especially indebted to my law clerks, Eve A. Marsella and Taylor Brown-Duncan, who provided their editing and technical prowess to the 27 Articles, and for the day-to-day work they undertake to make the judicial process immensely successful.

Finally, I thank my family, whose unwavering support and understanding have been my rock throughout my career.

Hon. Scott C. Clarkson
January 2024

ARTICLE 1

AFTER THE SWEARING IN

On the day you are sworn in as a judge, typically by your chief judge but sometimes by a district judge,[3] your world changes. Not as much as it does with your first newborn's arrival, but you can bet that with both events, life as you know it will dramatically change. The first day will be a whirlwind; you'll be introduced to most of the clerk's office personnel and other administrative staff. Write down their names.

When you are assigned cases and take the bench those first few months, take it slow and easy. Be easy on those before you. You might be infatuated with the robe in these new times, but you do not want to start off with something that you will have to then self-correct or atone for later (believe me). When you are more familiar with the counsel before you, the practice and procedure culture, the flow of motions practice, and the appropriate timing of hearings, you will be able to adjust as you'd like to for both your and counsel's benefit.

You will likely be handed off cases in mid-stream from retired or "on recall" colleagues. Take your time to personally read all of the docket entries and selected pleadings and orders. Obtain the present scheduling orders and revise them to your own calendar if necessary.

Early on, expect to spend a bit more time on each matter in your daily calendar and listen to the counsel's discourses generally without interruption. Remember that, besides trying to sell you on their arguments, they are working to feel you out, observe your reactions, and test procedural suggestions to see how far you will let the rules go. They will report back to their colleagues in the Bar almost instantaneously.[4] In the Central District of California, we have a local rule (based on our

3 My esteemed colleague Bankruptcy Judge Christopher M. Klein (E.D. Cal.) was sworn in by then-Ninth Circuit Judge Anthony Kennedy, who three weeks later became an Associate Justice for the U.S. Supreme Court.

4 In the movie *Pulp Fiction*, when Vincent tells Mia about a rumor he heard about her, she tells him, "When you little scamps get together, you're worse than a sewing circle." *Pulp Fiction*, 1994, written by Quentin Tarantino.

interpretation of the federal rules of procedure) that all Motions for Relief from Stay (MRAS) must be served on both the debtor and their counsel. If it's a chapter 11 case, the top 20 unsecured creditors must be served. Importantly, the local rule also requires service on all junior (and senior) lienholders.

My early experience (for a least a year into my service) was that very few counsel and their offices (it's always the fault of the paralegal, you know) could get this service process right. When they appeared at the lectern, counsel tended to argue that it was ok, other judges don't mind, your predecessor didn't mind, and they all commonly waived the service requirements. Another favorite is the argument that even though the case had been dismissed for some reason a week or so ago, the order granting the MRAS should not be denied, based on the same argument: "Other courts don't mind doing it."[5] The companion argument in complex — or even not-so-complex — cases is always, "Oh, they all do it in Delaware and the Southern District of New York." Don't you believe it.

These early events are simply probing exercises. How does our new judge react to waiving the rules? What are the limitations here? Go easy in your demeanor as you gently and politely decline the invitation to waive the rules.[6] Don't argue, and perhaps simply use the canard, "I'd really like to, but if I allow it here, I'll have to waive it for everyone."[7]

Going slow and easy will pay off, and not just for your learning curve and reputation: It will result in hours of saved future case management and hearing time. As an MRAS is continued for a month to permit proper service, in about the third or fourth round of filings by the firms tasked with filing simple MRASs, they get the message, and suddenly righteous and warranted motions, both opposed and unopposed, can be granted or denied on the papers with little or no argument, and with no controversy.[8]

5 Under the rubric of "no harm, no foul," it is certainly worthy of consideration, but there are unintended consequences of entering orders in dismissed cases.

6 Remember that for good cause, and if you are not causing due process issues, you can waive almost any rule.

7 Of course, you don't have to allow it for others, but it ends the discussion. There will be time later for intelligent and rewarding dispensations.

8 Speaking of arguments, remember that you're not on the bench to win an argument; you are there to decide them. Think twice before you are baited into engaging in argument. Listen and consider; ask questions. Thank counsel for their points of view, then let them hear your decision.

ARTICLE 2
BAR CULTURE

Learn all you can about the bankruptcy Bar and its culture. You'll be invited to Bar education events, including "Judges Nights" and meet-and-greet mixers. You may think you know the players if you came from their dens. If you formerly practiced in the local Bar for years prior to your appointment, you'll have a working knowledge of the Bar's players. However (and here is an important revelation), what you think you know about your former legal colleagues can be massively skewed or in error. Your point of view has now changed. As a prior adversary, you might have had quite a different vantage point than you might have going forward. As a judge, you can and will see things differently; you might discover different shades of personality, skills, honesty (and dishonesty) and forthrightness (and nontransparency) in your former colleagues and adversaries. Be prepared for a paradigm shift in your belief system in the membership of the local Bar.[9]

Do not get into legal/point of law discussions with individual former colleagues until you join a formal Inns of Court or related organization, and make sure that you aren't giving advisory opinions even then. Private and semi-private discussions with former colleagues will only lead to heartbreak when you must rule against them from the bench after you've had such a previous discussion.

9 At some early point while on the bench, you might come to see that counsel are not adversaries, but are simply trying to do their job, make a living and protect their clients, and are working hard to remain straight-shooters with the court. They are always trying to ensure that they don't cross the line, and, brothers and sisters, it's hard. The problem, of course, is that the line is hazy; it's never generally bright. Unfortunately, more than once has an appeals court saved a clearly bad actor who has boldly lied to the court from significant sanctions having been reversed when the appellate court finds a semblance, an iota, of legally ambiguous support in the arguments shaved to the nth degree. Perhaps if worse comes to worst, refer the counsel to a district disciplinary board.

ARTICLE 3

BEFRIENDING LAWYERS

Generally, you know the bankruptcy lawyers appearing before you. In private practice, some were friends of yours, while others were very friendly. Only a very few caused indigestion at best and at worst created a desire to avoid at all costs. But there is a warning available, courtesy of Cameron Crowe.

In the film *Almost Famous*,[10] preeminent rock critic Lester Bangs gives sound advice to William Miller, the 15-year-old wannabe music writer.

> Lester Bangs: "Aw, man. You made friends with them. See, friendship is the booze they feed you. They want you to get drunk on feeling like you belong."
>
> William Miller: "Well, it was fun."
>
> Lester Bangs: "Because they make you feel cool. And hey. I met you. You are not cool.… My advice to you: I know you think those guys are your friends. You wanna be a true friend to them? Be honest, and unmerciful."

10 *Almost Famous*, 2000, written by Cameron Crowe.

ARTICLE 4
DIVISIONAL REQUESTS

Deal with your clerk of court or chief divisional/operational personnel when you require significant assistance on a chambers or court matter. On the occasion of need or a fix, tell your law clerks that you will be contacting the clerk's office, although if they can short-circuit the process with less senior professionals in the clerk's office, let them do it.

Do not present significant requests to anyone else in the sub-administrative/clerk ranks. Junior operational employees will be confused; they really want to help, but the trouble is, they may be inclined to brag or try to one-up a colleague, and the clerk or divisional person in charge will not appreciate being gone around. They need to know that you are a team member with an appreciation of the chain of command. This is the federal government. The first time you go outside the chain of command, government employees may also feel that they have a special relationship with you or that they have done you a favor that can be cashed in later. More than a few senior government officials have encountered and regretted this situation at some point in their careers. Avoid this at all costs.

When valuable or remarkable assistance is provided, please don't forget to write a note to the chief clerk or the divisional operations manager. Compliment and applaud this assistance. Remind your law clerks to also add their written thanks. These notes go into files and show up later at annual performance reviews. Your court and chambers cannot function without the efforts of the entire team, and this should always be in the back of your mind.

ARTICLE 5
PROFESSIONALISM

Warning: The following sounds harsh. On the other hand, remembering this could save your career and avoid judicial resignation, vast amounts of fee disgorgements in former cases before you, and just downright embarrassment.

I quote the fictional character Pope Pius XIII from the HBO series "The Young Pope (2016),"[11] played by Jude Law as Lenny Belardo (Pius XIII), who said to an overly friendly sister and papal cook:

> Mother … friendly relationships are dangerous. They lend themselves to ambiguities, misunderstandings and conflicts, and they always end badly. Formal relationships, on the other hand, are as clear as spring water. Their rules are carved in stone. There's no risk of being misunderstood, and they last forever.

Another lesson needs to be presented here. Following the pandemic, we are now in an age of hybrid remote judicial hearings. The Administrative Office of the U.S. Courts has sanctified the remote audio/video hearing process, creating very fine rules for the official conduct of remote proceedings. Read them and consider implementing the systems available — but remember that all microphones and cameras always should be considered "live." Unlike studios, you have no red light on remote cameras and microphones. When you see a microphone or camera near you, shut up.[12] As practical advice, your law clerk should be monitoring all remote hearings and serving as your failsafe to avoid costly and unfortunate events.

11 "The Young Pope," HBO 2016, written by Paolo Sorrentino.

12 From Stephen Soderbergh's 2001 movie *Ocean's Eleven* (Tess: "You of all people should know, Terry, in your hotel, there's always someone watching.").

ARTICLE 6
MANAGEMENT COMMITTEES

Most bankruptcy court districts have management committees, such as Case Management, Information Technology, Rules and Executive Committees. Join in and learn the ropes. When you are new to a committee, immediately ask your clerk of court for the past two years of committee meeting minutes, and read them. Listen to and observe the staff and their recommendations in particular, and of course listen carefully to your wise colleagues. You might be kindly asked for your opinions in the beginning, but politely beg off.

Again, remember that you are now part of a government operation. You need to understand much more before you chime in. When you attain more insight and see opportunities to suggest course changes, approach your colleagues individually prior to meetings with ideas to vet. You might be surprised how many prior times a suggestion has been made and disregarded or proven unworthy. *Nihil sub sole novum*.

If you do not have the votes, don't request votes. Committee meetings are not typically the place to change minds — not that you shouldn't try to do so when clarity for you emerges. Many proposals you see at committee meetings have already been discussed informally and privately with staff and other members of the committee. Proceed accordingly and try to get ahead of the curve.

Most districts inform their legal constituency (the practitioners) about these committees and invite Bar participation at times. The local Bar associations should be invited to make suggestions, be polled by the committees with various ideas and proposals, and at times have representatives sit in on "public" parts of a committee meeting. There is absolutely no downside to active participation and interaction with the Bar. You'll find that some of these lawyers will later be your colleagues.

ARTICLE 7

CREATING YOUR OWN NETWORK

Communicate with your colleagues as often as you can without causing annoyance. Create your own network of close associates throughout the country to bounce thoughts around. Serving as a judge is a solitary position, and one should understand that judging is generally not, and shouldn't be, a collaborative effort. But collaboration on the most basic principles of judging and obtaining suggestions, ideas and views on the application of law and procedure is quite important to all of us. On the other hand, judges should not be "crowdsourcing" decisions.

Judges in the same building and your district, like members of Congress, are each individual islands. Respect that they might not do as you are doing, that their ideas are very sound and principled, and that you certainly might be getting it wrong. Your personal bias is the chief mechanism of incorrect thinking.

Politeness and courtesy reign, and you won't be told to get lost when you ask many questions. But limit substantive questions until after you have tried to research issues on your own, and explain that you are in a quandary after your own efforts have been made.[13]

Also understand that while a colleague may be shy, it's almost never that they don't want to interact with you; they just like to listen more and wisely digest your inquiries. Don't mistake initial noncommunications with a lack of desire to listen, evaluate your views, comment and be helpful. Never read too much into nonresponsiveness; you often will be very surprised to find that you have a compatriot and holder of your viewpoint. In the main, your colleagues will jump at the chance to help you.

13 As with all rules, exceptions are available. I am lucky to have a brilliant colleague and friend, Hon. Barry Russell, who will always unmercifully beat me at ping-pong and still immediately take my pain-in-the-rear emergency calls on difficult evidence questions during my trials. Not once has he asked me, "Have you looked yet in my book?" And, just in case anyone asks, I've never dumped a game to him.

ARTICLE 8

DISTRICT COURT JUDGES

"Precedence is a serious matter … and you must attain it." Lawrence, Article 7.[14] Article III judges, as judicial officers, are interesting for a multitude of reasons. In 1981, I worked for one[15] who (allegedly) complimented me when I disposed of an accumulated 100+ ripe-for-determination bankruptcy appeals in a month that had stacked up when the four district judges in the Eastern District of Missouri learned that I was scheduled to arrive as a clerk. (I had already served as a chapter 7 panel trustee in the District of Columbia by that time.) "Clarkson, I like the way you work," I was told. "You don't waste time looking up the law." I immediately promised that I would try to do better.

These lifetime judicial officers are appointed by the President of the United States, confirmed by the Senate, and forced to painfully witness the blue-slip process firsthand. One can only be amazed and fully appreciative of their career steps and the appointment processes they endured in their long journeys to the bench. Their emotional and physical experiences with respect to a clearly crowning appointment cannot be fully described, except perhaps to their own families or therapists.

Once they are sworn in, and perhaps only then, do they really recognize the immense power in which they have been vested. The old joke, "God wishes she was a district court judge," should not be taken lightly. Until one has observed an order taking over an entire school district and then running the school district from chambers for several years, usually with the assistance of a special master, with that

14 Just for the record, the official precedence is district judges, bankruptcy judges, then magistrate judges. But try telling that to the Federal Bar Association.

15 Hon. William L. Hungate, district judge for the Eastern District of Missouri, serving on the district court in St. Louis from 1979-92. The story is more complex. I worked on his last congressional reelection campaign in 1974, then served on his successor's campaign in 1976. As a legislative assistant in Washington, D.C., to his successor, I stayed closely in touch with him as he reentered the private sector as a lawyer for a St. Louis firm (then Thompson & Mitchell) until his district court nomination in 1979. I assisted in creating the Northern Division of the Eastern District of Missouri in the 1980 Judgeship Authorization bill, and then served him at the court. We remained life-long friends, and upon my own appointment, his widow gifted me his embossed ceremonial gavel, which sits on my bench today.

original order being affirmed by the circuit and then the Supreme Court, does one appreciate the situation.

Many district court judges have heard, seen and learned more about almost everything in legal life than almost every politician, statesman, lawyer or priest extant. During jury trials, they have learned to listen, sometimes painfully long and hard.

No doubt political ideology is a part of Article III judging, but those ideological principles fall into about 3-4% of their caseload. Like bankruptcy judges, they hate being reversed and, worse than that, remanded.

Take the opportunity to informally visit with your district judges. Ask about their caseloads, their clerk-hire techniques or the quality of the wi-fi in their chambers.[16] Buy them a drink at Judges Night. When they do receive an appeal from your court, at least they can put a face to a name — not that it would ever matter.[17]

16 Upon my appointment and assignment to the duty station in the very ornamental Ronald Reagan Federal Building and Courthouse in Orange County, Calif., I discovered that there was no wi-fi available for the district, bankruptcy or magistrate judges in the building. I will proudly say that I was instrumental in securing private wi-fi for everyone several months into my tenure. It was not without costs, and the GSA has never forgiven me. However, at times when introduced to others by district judges, I am described as "the FNG who gave us internet."

17 You also will learn early, or already know, about a concept long on the discussion table and implemented on a few occasions around the country. It is still being advanced in certain quarters of the Administrative Office of the U.S. Courts and is called "vertical consolidation of courts." This concept harkens back to the pre-Code days (1934-78) when bankruptcy courts were completely controlled by the district courts. The brilliance of the 1978 separation of the bankruptcy court judges and clerk offices from the district courts has elevated federal law and judicial process in the judging of bankruptcy matters to the highest of levels. The continued belief that re-consolidation of clerks' offices could save the Judiciary a few bucks has been shown to be incorrect in study after study, and it is truly several steps backwards.

ARTICLE 9

OFFICIAL BAR INTERACTION

Almost every year, and not counting catastrophic pandemic events, there will be district-wide judges meetings and a circuit conference. Many districts and circuits have "attorney representatives" who are general practitioners in our federal courts, and they are called upon, at their own expense, to assist in organizing educational programming at these conferences. These are smart, dedicated lawyers, many of whom are themselves destined to join the bench in the future. Identify the educational programming chairs, and volunteer to assist their efforts for the upcoming conferences. There is a circuit or district judge designated as chair for the next conference, and they would like nothing more than having the opportunity to delegate a task or two to you.

However, ideal participation is to do so without being noticed. As Lawrence said, "Do not be too intimate, too prominent or too earnest."[18] The chair of the conference deserves the credit, and the attorneys preparing the programs certainly earn the credit.

18 *See Article 8* by T.E. Lawrence.

ARTICLE 10

HUMOR

Your sense of humor is a very strong tool in the judging world. Weird, funny, ironic, stupid, or crazy things will arrive like clockwork each workday, whether in pleadings, oral arguments, or internal courtroom procedures and requirements — and of course, there is the General Services Administration.[19]

Judges have all types of ways to express their humor; in court, it's best to maintain a dryness with a dab of irony.[20] It's a terrific way to de-escalate a tense moment. Don't expect counsel and parties to get your humor, or to express that they get it, and certainly don't confuse courtesy laughs for true appreciation of attempted humor. Remember, you are never as funny as you think you are.[21]

The first rule in humor is to never punch down. Certain news media outlets try to work in humor, and they don't understand why it rarely works. That's because most of their "comedy/news analysts" are punching down with an obvious agenda.

Never, ever, use a counsel or their argument as a pivot for a laugh. If it happens, don't wait; apologize immediately. On the other hand, the slight use of pointed irony with respect to an argument is always compelling and a credit to your position as a preeminent jurist.

19 There will come a time when you learn that a plumbing leak behind your chamber's wall, which could be fixed with one visit to Home Depot and $600, will require a GSA review, estimate and charge to your court of $16,000.

20 Everyone having spent time in my court is rolling their eyes about now. But, as Jules said in *Pulp Fiction*, "I'm trying, Ringo. I'm trying real hard to be the shepherd." Do as I say, not as I do. I'm not the best example of making humor work.

21 The known standard comment about this author is, "He apparently doesn't care that he's not that funny."

ARTICLE 11
CASE DEFICIENCIES

As you read pleadings, including motions, responses, status reports, pre-trial stipulations, and disclosure statements and plans, you may at times be moved by the deficiencies to enter into a virtual meltdown. Go easy.

Like a surface ship crossing the North Atlantic, you see only 10% of an iceberg. While you have seen so much in your own prior legal practice and on the bench, remember that almost every case is different in its own way.

Case failures due to factual or legal problems or downright incompetence or circumstances beyond anyone's control happen all of the time. But one never knows in the beginning or middle of the case how it really might turn out. *Pro hoc ergo propter hoc* is a logical fallacy; it is almost never true.[22] In one of my last private practice cases, I represented a secured lender to an engineer trying to create a flying car. "This case, like the car, will never get off the ground," I believed. But the bankruptcy judge allowed the case to go forward for several years (after my client was paid in full through unrelated collateral), and to my pleasant surprise I learned that the debtor emerged from chapter 11 following a successful § 363 sale and deal with his creditors. "C'est la vie," say the old folks. It just goes to show you never can tell.[23]

22 *See* "The West Wing," Season 1, Episode 2, by Aaron Sorkin. President Bartlet: "After, therefore because of it. It means one thing follows the other, therefore it was caused by the other. But it's not always true. In fact, it's hardly ever true."

23 Prof. Chuck Berry, "You Never Can Tell," released in 1964, but written between 1962-63 in a Missouri jail after he was transferred from the Leavenworth federal facility.

ARTICLE 12

STEPPING BACK, STEPPING IN

Your influence on the bench is considerable — and yet, you shouldn't be perceived as the driver of the buggy most of the time.[24] Serious counsel and trustees in reorganization and liquidation cases know what they are doing; they mostly have their game plan.[25] The natural adversarial tension among parties works to bring out the truth, new ideas and solutions. Truly, there are cases presented where there is only rubble to be sorted out by the court. When you see it, don't be afraid of stepping in. For example, the recent crypto cases have given rise to matters that are somewhat indecipherable and unmanageable by DIPs, CROs, secured lenders, committees and equityholders.

Don't hesitate to intervene and require objective case management during those times, or to quickly deescalate matters. Establishing short deadlines might be a good starting point,[26] with required progress reports.[27] Some, but few, counsel are going to voluntarily set benchmarks, and they will appreciate explaining to the client that "the court made them do it." Later, a healthy OSC as to why a case shouldn't be converted or dismissed can work magic with respect to moving toward the conclusion of a case. OSC's are cheap. Use them to move cases along when required.

24 On the other hand, one should not miss the lines written in the 2001 film *Mulholland Drive* by David Lynch. Cowboy: "There's sometimes a buggy. How many drivers does a buggy have?" Adam Kesher: "One." Cowboy: "So, let's just say I'm driving this buggy. And, if you fix your attitude, you can ride along with me."

25 But begin to worry when there seems to be, from the starting point or at a sea-change moment, a certain lack of transparency or candor. You'll know it when you see it.

26 Congress did it on purpose with the stringent deadlines in the Small Business Reorganization Act of 2019. *See, e.g., In re Progressive Solutions Inc.,* 615 B.R. 894 (Bankr. C.D. Cal. 2020).

27 An excellent lesson exists from President Richard M. Nixon, who spent part of his early career as a lawyer located in the temporary (and quite ugly) Quonset huts located on the Washington Mall. In 1969, on the very day he was sworn in as President, he wrote a memo to his Chief of Staff. Paraphrased, he said, "I want a memo by you each day about what you did the previous day to remove those huts from the Mall. When they are all gone, no further daily memos will be required." The huts were removed in three days, after 27 years. Nothing is more permanent in Washington, D.C., than a so-called temporary fixture.

ARTICLE 13

CONDUCTING YOUR OWN RESEARCH

Don't forget the importance of your own (*i.e.*, not your clerk's) independent judicial research. The extent to which judges perform their own research varies significantly. In most instances, judges rely heavily on the work of their clerks, especially in complex cases or when time constraints are significant. Ultimately, however, a balance between independent research and collaboration with law clerks will ensure the effective functioning of the judicial system.

Here is a laundry list of reasons why you should take the time to sit and work with both online research and books as you read and analyze the pleadings before you. Paste it up on your chamber's refrigerator.

- *Legal Expertise*: You are expected to possess a strong legal background and expertise. You should have a thorough understanding of the legal principles, statutes, precedents and case law relevant to the cases before you. Conducting your own research allows you to stay current with legal developments and precedents and enhances your ability to make informed decisions. And, frankly, many of us have been doing legal research for longer than our law clerks have been out of grade school.
- *Impartiality*: Performing independent research helps you avoid bias and ensures that you make decisions based on the law rather than personal beliefs. It contributes to the perception of fairness and impartiality in the judicial system.
- *Case-Specific Knowledge*: You will need to delve into the specific facts and nuances of a case to make well-informed decisions. Conducting your own legal research allows you to gain a comprehensive understanding of the issues at hand.
- *Efficiency*: Given the caseload and time constraints, you will often need to

supplement the work done by law clerks with your own research to ensure accuracy, thoroughness and efficiency. It builds confidence in your judgment and expertise when you recognize at a certain point that you are more knowledgeable about the facts and law of the case than the counsel.

- *Educational Role*: Judges play an educational role in shaping the law through their decisions. Engaging in research allows you to thoughtfully contribute to legal scholarship and precedent and to influence the development of the law.
- *Technology and Resources*: You have remarkable access to legal databases, libraries and other resources that facilitate legal research. Go down to your court library (if there still is one) and introduce yourself to the librarian (if there still is one). Visit often, and use these valuable professionals early and often.
- *Collaboration with Law Clerks*: While you perform your own research, you will be collaborating with your law clerks to manage the workload and ensure that all relevant legal issues are considered. When they see emails from you at 6:00 a.m. about some cases you've discovered 2,500 miles away in the Fourth Circuit that seem remarkably helpful, they know that you've been on the job, or at least have helpful judicial colleagues in the Fourth Circuit.[28]
- *Appellate Review*: You must provide well-reasoned decisions that can withstand scrutiny on appeal. Try not to get reversed and remanded.[29]

28 Query: Are non-Ninth Circuit law clerks penalized or otherwise ridiculed for presenting to their own judges' Ninth Circuit decisions to consider?

29 Aptly analogized by one district judge as "being told to put on a wet wool bathing suit."

ARTICLE 14

SANCTIONING ATTORNEYS

Decades ago in my district, an epidemic existed of attorney noncompliance with almost every one of our local rules. Filing pleadings late, not filing them at all (*i.e.*, status reports for adversary proceedings or cases), and not serving the U.S. Trustee or chapter 7, 11 or 13 trustees were all common practices. Filing and serving notices of continuance of a hearing when one has not been granted by the court, and even worse — not appearing in court at all — were typical. We practitioners watched from the back benches as our judges levied $50 or $100 sanctions per event. But we all knew that for those repeat offenders, this was simply the cost of doing their bad business, and it would never stop.

It was finally curtailed for the most part when our judges began appearing at every district Bar association function, demanding (*i.e.*, screaming like banshees) to have five minutes up front so that they could sternly lecture the Bar about these unhappy events, and stating that they meant business. If not significantly corrected, the next steps taken were to simply deny the offender's motions on the spot or continue matters and make counsel return to court. The well-tuned threat of requiring offenders to pay opposing counsel's legal fees for their required return and inconvenience also worked wonders. The tide eventually turned to a meaningful lower volume of noncompliance.

You have discretion in determining sanctions, and the specific circumstances of each case will influence your decisions. Sanctions can range from monetary fines to more serious measures, including terminating sanctions and even incarceration for civil contempt. In some districts, there may exist an Attorney Disciplinary Committee, where you can refer bad actors.

Each circuit has finely honed its own case law on the standards applied in various situations, setting out your inherent authority under § 105 of the Code and Federal Rule of Bankruptcy Procedure 9011. This case law should be studied, and its

examination will provide sound guidance for the proper parameters, levels and soundness of your actions.

When sanctions must be considered, a technique successfully used by many courts is to bifurcate the decision-making process. First, has a sanctionable event presented itself? The required evidentiary proceeding will lend itself to establishing (or not) the required clear and convincing evidence. But then pause. After conducting the hearing, but not yet making your findings, invite the parties to step outside and visit (my words), or meet and confer days after the proceeding. Invite them to try and settle the affair themselves. You might be surprised to find that counsel and parties are more inclined to direct their own destinies rather than put them in the hands of a judge.[30]

30 Five or so years ago, I undertook this formula. The parties came to a large settlement in several weeks' time. Then, a year later, one of the counsel involved mentioned to me that I significantly sanctioned a law firm. "You are mistaken, my friend," I responded. "I sanctioned no one. A voluntary settlement occurred."

ARTICLE 15

DUE PROCESS

Due process isn't necessarily overrated; it's just not generally understood. A basic lesson of providing due process to a party is understanding that a party's complaint of lack of due process must be demonstrated with evidence that they were (1) denied a meaningful opportunity to be heard and (2) they were prejudiced thereby.[31]

The only real appropriate remedy for a due process violation is "to order the process that was due."[32] When there is a question of denial of due process, simply address the problem. Add an omitted party if necessary and allow further briefing or oral argument. Then when remedied by you, the due process claim is moot.

31 *See In re Rosson*, 545 F.3d 764, 776 (9th Cir. 2008) (rejecting debtor's due process claim for lack of prejudice), *partially abrogated on other grounds as recognized in In re Nichols*, 10 F.4th 956, 962 (9th Cir. 2021).

32 *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988); *see Levine v. City of Alameda*, 525 F.3d 903, 906 (9th Cir. 2008) (citing *Brady* for this proposition and approving of full evidentiary hearing to remedy failure to provide a hearing).

ARTICLE 16

DARING TO GET IT RIGHT

Dare to get it right. Courts don't confess errors; parties do. Confessions of error are rare and occur mainly at the appellate level, often by the government as a party. However, judges have their own opportunities to generically confess error at several stages of a proceeding.

For instance, while most rulings are not effective until the order is entered, some rulings[33] are made from the bench following oral arguments, and then, upon returning to chambers, certain afterthoughts occur. A wise course is to immediately contact the parties through your law clerk and express that you want to continue to explore the issues and that they should not yet rely on the oral rulings. Issue a short order explaining that while you orally ruled from the bench, you may be adding, and perhaps modifying, findings and conclusions.[34] If you'd like, invite them to return to court in short order. Perhaps further briefing is requested. Have no concerns about explaining your step-back. Premature oral rulings can set a case off-course and invite time-consuming appeals. Doubling down never works.

If your written ruling or order has been entered, you may still have the opportunity to reconsider, *sua sponte,* if a Notice of Appeal has not been filed or the doctrine of law of the case hasn't set in. And of course, if a party has filed a Motion to Reconsider, you have more time to reflect and, if necessary, amend or reverse course. Don't forget that you may supplement your original findings and conclusions while denying the reconsideration motion.[35]

33 In fact, you should consider giving oral rulings as often as possible, although there is something to be said for delivering written opinions at the start of your tenure so that the Bar can have a better idea of your general approach.

34 The greatest display of judicial acumen I've ever witnessed was the hours-long oral delivery of the bankruptcy court decision confirming the *Purdue Pharma* chapter 11 plan of reorganization by Bankruptcy Judge Robert D. Drain (S.D.N.Y., ret.) in 2023. His decision was followed by the statement that he reserved the right to supplement his rulings in writing.

35 However, you should never miss enjoying the private thought that a client said to their lawyer after a Motion to Reconsider was denied but the court and the opposing party were allowed to build and enhance the record for appeal: "You did *what*? Did you bill me for that?"

Dare to get it right. On the other hand, remember that just because you were reversed doesn't mean you were wrong.

There is another lesser-known mechanism available, that being Federal Rule of Bankruptcy Procedure 8008, the Indicative Ruling. How many times has a trial judge desired an opportunity to tell a pending reviewing court about an issue they felt she could correct? In certain circumstances, under FRCP 8008, combined with § 105, you can issue an Indicative Order *sua sponte*, letting an appeals court know what you would do in the event it is remanded back to you for a purpose you suggest. This could cut the appeals time significantly, short-circuit an error you've discovered, reverse reversals, and perhaps be highly appreciated at the appellate level.

ARTICLE 17

BEING REVERSED AND REMANDED

I hate getting reversed and remanded. Having to do a case again is irritating at best and at worst downright embarrassing when your buddies send you snarky emails saying, "Remedial courses are available!"

I've learned that being mindful of the standards of review to be applied to your decisions by appellate courts at the front end will reduce the inflow of funny-but-rib-jabbing notes from your friends. Make mention of these standards in your own decisions, and let the parties know that you know what standards you are operating under. Counsel reading your decisions that simply note the standard of review you expect to have with your work may allow them the opportunity to better evaluate their chances of success on appeal. They also will learn from your brief comments on the review standards by utilizing these as a roadmap for briefings and evidence for future winning formulas (or is it formuli?).

These inserted references also provide cues to reviewing courts (read "district courts") that you had in mind the requirements necessary to come to your decisions, and that your factual and legal foundations are solid.[36]

The federal appellate standards of review refer to the criteria and principles that appellate courts use when reviewing decisions made by lower courts. These standards guide appellate courts in determining whether the lower court's decision should be affirmed, reversed or modified. The specific standards can vary based on the nature of the legal issue being reviewed. Here are some common appellate standards of review:

- *De Novo Review*: In cases where the lower court's decision involves questions of law, appellate courts often apply *de novo* review. They are not going to give you any deference as to your legal interpretations. Getting your law

36 A cynical person would also believe that such references are helpful to newly minted district or BAP law clerks unfamiliar with these review standards, providing them with a leg up on their own research.

right in the first instance can save you time and heartbreak.[37]

- *Clear-Error Standard*: When the lower court has made findings of fact, the appellate court typically applies the "clear error" standard. Under this standard, the appellate court defers to the lower court's factual findings unless there is a clear error or mistake. Don't skimp on making a good record. Invite as much relevant evidence as the parties can present. If you sense that a counsel is rushing, perhaps feeling that they are under time constraints, give them full opportunities to extract all of the evidence they think they need to make their case.[38] At a trial's conclusion, revisit your own laundry list of evidence that each side presented, and perhaps give them an opportunity to briefly inventory it in closing statements. Give your appellate court a fighting chance to affirm you.

- *Abuse of Discretion*: Appellate courts may use the "abuse of discretion" standard when reviewing decisions involving discretionary judgments made by lower courts. An abuse of discretion occurs when the lower court's decision is deemed unreasonable or arbitrary. Explain as much as you can about your decisions, especially with judgment calls. Much of what you do during hearings and trials are up to you. My favorite is (say it out loud): case and docket management. "I'm going to allow 20 minutes of oral argument on each side on this matter."

- *Plain-Error Review*: This is the boneheaded ruling review. Appellate courts may review errors that were not raised during the trial if they are deemed "plain errors" that affected the fairness of the proceedings.[39] This standard is often applied in situations where the error was obvious and significantly impacted the outcome of a proceeding. Discovering your mistake after the fact might be a good time to issue an Indicative Order under FRBP 8008, explaining to an appellate court what you would do if they ruled that something was a plain error.

37 One of your recurring existential moments will be trying to apply collateral estoppel to a state court judgment (default or contested, take your pick) trying to find willful and malicious intent under § 523(a)(6). Good luck with that.

38 "Are you sure you want to rest your case, counsel?"

39 My personal observation is that they typically occur just before lunch or beginning about 4:00 p.m. in a trial that started at 9:30 a.m.

Finally, understand the significance of the Supreme Court decision in 2018 that firmly established the standard of review for mixed questions of law and fact. This is important, and I firmly believe that it is a watershed event respecting the empowerment of federal trial courts across the country. Carefully read the 2018 decision *U.S. Bank N.A. v. Village of Lakeridge, LLC*[40] to appreciate your authority to create an extensive record that will be upheld on the clear error standard, not under *de novo* review. You will be quite pleased.

40 583 U.S. __, 2018 WL 11438222.

ARTICLE 18

NONBANKRUPTCY COUNSEL AND CIVILITY

Don't hesitate to let nonbankruptcy counsel know that the forum they find themselves in is unique.[41] Deals are always being made, and compromise is the mainstay of bankruptcy. Bankruptcy court proceedings are almost never zero-sum games, and the uninitiated may find that unsettling and foreign to them. You may also have the opportunity to educate these nonbankruptcy counsel of the existence of "bankruptcy dollars." What they may be fighting about is a number that will only turn into a 1% recovery through a distribution from the estate, yet their client's legal fees are in real dollars. The looks on their faces when they realize that a million-dollar judgment is only worth $5,000 are priceless.

Suggest early meet-and-confer sessions between counsel and remind them that status reports are not adversarial; there is room for alternative positions in all reports. Invite counsel to (follow the rules and) create discovery dispute stipulations. Demand that they visit and come to terms early with undisputed facts and law, and informal discovery. Even suggest that random acts of incivility may be costly.

A point on incivility: Clamp down. Don't permit it in your court or in pleadings; stop it in its tracks. Call offenders out, and explain that interruptions during opposing counsel's arguments, sexism, racism, bullying and *ad hominem* attacks will not be tolerated.[42]

41 I personally enjoy watching nonbankruptcy counsel argue as if there is a jury present.

42 For years I've watched male counsel interrupt their female counterparts by standing up, attempting to elbow the female opposing counsel away from the lectern while they were in mid-sentence, and talking dismissively about and to them. A true moment: "Why are you standing, Counsel?" "Oh, I thought or hoped that she was finishing up." I had expected that since the last half of the twentieth century and into this first quarter of the twenty-first, we would have put an end to these aggressions and diminishments. Judges and counsel on the receiving end should not be quiet about these incidents.

ARTICLE 19

ACTS OF MERCY

As a judge, try and find ways for opponents to give each other, and their clients, a way out. Suggest to counsel that they might go easy. To some bankruptcy practitioners, this will be heresy. However, we've all seen it. Be it in sports, business, bankruptcy cases or adversary proceedings, the temptation to dominate and crush opponents can be alluring. This applies to both judges and the parties before them; primal instincts developed through years of law practice can get the better of all of us at times.

The desire for counsel to emerge victorious often overshadows the moral imperative to allow adversaries a way out. It is crucial, however, to recognize the value of compassion and the long-term benefits of taking one's foot off the opponent's neck. There are ethical and strategic reasons for practicing mercy in court.

At the heart of the argument for mercy lies a fundamental commitment to ethical principles. Treating opponents with dignity and respect is a reflection of one's own character and values. The act of allowing a way out acknowledges the shared humanity of both competitors, fostering a culture of fairness and sportsmanship.

Moreover, demonstrating mercy sets a positive example for others, promoting a healthier and more compassionate competitive environment. Leaders who exhibit grace in victory inspire admiration and contribute to a collective ethos that values fairness over ruthlessness.

Beyond the ethical dimension, there is a strategic wisdom in allowing opponents a way out. Crushing adversaries without mercy may offer short-term satisfaction, but it can have detrimental long-term consequences. Humiliating opponents breeds resentment and creates enemies where there could be allies. By showing compassion, one can build bridges rather than burn them, fostering relationships that may prove valuable in the future.

Furthermore, merciful actions can contribute to a positive reputation. Lawyers are often judged not only by their achievements but also by how they achieve them. Acts of mercy can enhance one's standing in the eyes of the public, creating a positive brand image that attracts support and admiration. This is especially true if there is a desire for a later judicial appointment.[43]

Granting opponents an escape route also allows for the potential of mutual learning and growth. A defeated adversary, when given the chance to recover, may be more inclined to reflect on their mistakes and weaknesses. This process of self-discovery and improvement benefits both parties, as it contributes to the overall elevation of the legal practice.

The act of mercy can foster a sense of gratitude in the opponent, potentially leading to alliances, partnerships or collaborations in the future. By taking the long view and considering the larger picture, one can see the strategic advantages of allowing opponents a way out.[44]

43 My first appearance in any court, ever, was several days after becoming a member of the Virginia State Bar. I was asked to defend a recent immigrant upon his arrest in Virginia for having three driver's licenses at one time. He came to the U.S. from the Republic of Vietnam in 1975, and for some reason he thought he was required to have a driver's license to drive in Virginia, another one for driving in Maryland and a third for driving in D.C. None of the jurisdictions required him to surrender the earlier license obtained, thinking that this was his first and only. When they did receive notice of the second and third licenses, they simply suspended the one they had issued, which Virginia did. I looked up the Virginia statute and to my horror, there was a mandatory minimum 10-day jail sentence for driving under a suspended license. (During his arrest he had shown his Virginia license, and for some reason, all three licenses were now suspended.) I was heartbroken. When we copped to the offence with explanation, the judge sentenced my client to the mandatory 10 days but suspended the sentence by nine days. "It's 9:30 a.m., counsel. What time would you like to have your client report next door to the Fairfax County Jail?," he said. "Huh?," was my reply. "Step forward, counsel." He whispered to me, "First time?" I nodded. He continued, "Anyone in a Virginia jail at noon is considered to have served for a day. If he goes in at 11, he'll get a baloney sandwich and be released at 12:30 p.m. today. Step back." That judge taught me mercy.

44 How many times in mediation have we seen counsel refuse to carve out a measly 5% of their fees for unsecured creditors, only to see the entire case die months later because of a pandemic with no one getting anything? Karma is in operation here; I truly believe it. Of course, some clients of some opponents are just snakes, and you can't make a deal with a snake.

ARTICLE 20

JUDICIAL REIMBURSEMENTS

Here is an afterthought on your first days as a judge. Perhaps you had not worked for the federal government prior to your appointment, so this suggestion is important: Make an immediate inquiry to discover the person in charge of court financial affairs, especially judicial reimbursements. As a judge, you will be required to make significant personal financial outlays for judicial education events and seminars, and there is no one more important than the person in the clerk's office who can guide you on the reimbursement policies and forms to expedite your outlay recoveries, which can be a sizable impact on your personal budget. They can be your best friend at times.[45] Get to know them.

45 The brilliance of these professionals should never be underestimated. As a new judge, you might believe that a conservative approach to seeking reimbursement for personal financial outlays on behalf of your work is prudent. These experienced financial officers know simply by looking at your completed form that you've missed an obvious reimbursement and will let you know. Get to know these pros.

ARTICLE 21

GAINING CLARITY

The reasons counsel will give you for their actions might be true, but there are most certainly other, perhaps better, reasons for their actions, which are yours to figure out. When something doesn't really make sense, start first with the view that you are missing something.[46] Generally, something simply isn't being explained adequately.

When you don't understand an argument being made, it is essential to take appropriate steps to gain clarity. Politely ask counsel to amplify the specific points or arguments that are unclear. Encourage explanations in simpler terms or additional context.

Request elaboration on the key legal principles, facts or reasoning underlying the argument. This can help you grasp the nuances of the argument more thoroughly. Ask to be provided specific references or authorities to aid in your understanding.

If the issue is complex, ask both parties to submit written briefs or memoranda on points of contention. You hamstring your own efforts if you don't express openly a concern that arguments are unclear. This can be done diplomatically to avoid any adversarial atmosphere, but remember that it is important to maintain impartiality and fairness while seeking clarity. The goal is to ensure that the court understands the arguments presented before making informed decisions.

46 The next level, of course, is thinking that you are being bamboozled. In a decision, I once used (and with a footnote defined with citations) the word "hokum." I've seen "hooey" used, too. English is such a delicate language.

ARTICLE 22

PAUSING UNDER PRESSURE

Pausing under pressure, part one: Under submission. Stop and think about the hard questions and law. Ask for additional briefing (pocket briefs) when needed. Also, when you think that someone is making things up on the fly, challenge it (politely) by requesting a quick brief, with case citations.[47] Read the cases that are cited in the briefs. Have your clerks and externs review the citations to see if they say what counsel assert. ChatGPT can make stuff up, and sometimes it looks very impressive. But sometimes, it's the product of computer-generated hallucinations. Are counsel omitting lines/paragraphs/context within their quotes and analyses?[48]

Pausing under pressure, part two: Perhaps a recess is in order. Has something in the hearing or trial gone fantastically sideways? Are half the exhibits missing in the witness binder? The fire alarm goes off; should we go or should we stay? A counsel passes out, or heaves onto the lectern from the flu they've been trying to hide all day. An angry *pro se* runs threateningly toward your recording officer, clerk or the bench (Duck!).[49]

47 Giddy with catching someone's hand in the cookie jar, opposing counsel sometimes wait in the weeds, ready to spring onto an opposing counsel who has fabricated or altered a case citation or text. It's like watching a Nature Channel program concerning a hyena and a gazelle. While I'm sometimes irritated that they stole my thunder, I'm calmed by the fact that I didn't have to do the dirty work.

48 Of course, it was never intentional, you are told.

49 The inside-the-courtroom-cellphone-ringing crisis. For years, I have watched differing styles of judges, both in federal and state courts, as they have reacted to a cellphone ringing in court. I imagined that with each of these instances, I was observing the true colors of the judge. Some of these judges would flame out in a rendition of the scariest scenes from *The Exorcist*. That, of course, created their own crises and stress for all involved and observing. This judicial response created havoc and delay, and at times confirmed the thoughts about the judge that many had been harboring. Best story: The judge demanded that the offending counsel step up to the bench and hand over the offending phone as if she was a religious school third-grade teacher. "You'll get this back tomorrow when you return to court for it," she said. Ten minutes later, another phone went off. It was the same counsel, who revealed that he had two phones. Vesuvius erupted. I promised myself that if I ever served on a bench and a phone went off, I could trust the counsel or party to simply turn it off without being asked. Of course, it has happened on occasion, but my courtroom has never missed a beat. I just pray that it isn't my phone.

I've seen all of this. Take control of the courtroom and, except for the heaving due to sickness (where it is truly every person for themselves), stop everything cold, take command, and perform the necessary steps to reduce the crisis and panic.

ARTICLE 23

ASKING QUESTIONS

Declarative sentences by judges during trials, motion hearings and evidentiary proceedings by the court[50] are simply not as helpful as asking questions of each side. Often, you can develop harmony on legal or factual matters with a well-placed question. Here's why.

Asking questions allows you to seek clarification on specific points or arguments presented by the lawyers. This helps everyone (especially the other side) better understand the expressed legal positions.

The common debate is whether judges should ask questions of witnesses to elicit additional information or facts that might not have been presented during the arguments or testimony. Channeling Paul Newman in the film *The Verdict*, you don't want to win or lose a case for a side.[51] On the other hand, you would like a comprehensive understanding of the facts. I've seen it in action both ways, and my personal experience is that lawyers would rather know what you think you might be missing and be given an opportunity to cure a perception problem, rather than be required to address issues on a Motion to Reconsider or within an appeal. Finally on this point, the responses from witnesses will assist you in gauging their credibility.[52] In decisions made on the oral record or in writing, you should take every

50 Not counting the regular "sustained," "overruled" or "please move to the lectern while you're speaking; the mics are better there."

51 At least once in every law school ethics class, the film clip is shown of Paul Newman asking the judge, "With all due respect, your Honor, if you're going to try my case for me, I wish you wouldn't lose it." *The Verdict*, 1982, screenplay by David Mamet adopted from Barry Reed's 1980 novel of the same name. It used to be the film *Paper Chase* that was shown, but no one wants to discuss the hairy hand anymore.

52 When evidence is conflicting, try always to make a credibility determination. From a decision of mine: "A credible witness is a witness who comes across as competent and worthy of belief. This Court determines witness credibility on many factors. The substance of the testimony is tantamount, as well as the amount of detail and the accuracy of recall of past events, which affect the Court's credibility determination. Witness contradiction plays a part in the credibility determination. How the testimony is delivered also has an impact. Factors which include body language, eye contact, and whether the responses are direct or appear to be evasive, unresponsive, or incomplete are considered by this Court. In addition, when deciding cases, the Court is permitted to take into consideration its knowledge and impressions founded upon experiences in everyday walks of life."

opportunity to state your observations as to witnesses' credibility. Appeals courts will rarely, if ever, substitute their view of credibility for yours.

By posing questions to counsel, you can test the legal theories put forth. This process helps in evaluating the strength of the arguments and identifying potential weaknesses in the legal reasoning. Challenge assumptions made by counsel with politeness and courtesy. This encourages them to critically evaluate and defend their positions, contributing to a more rigorous legal analysis. By your questions, you can also allow an appeals court to understand your own analysis.[53]

Asking questions rather than making declarative statements helps you maintain the appearance of impartiality, and signals to both sides that you are actively considering various perspectives.[54]

Finally, the process of asking questions aligns with the principles of due process, ensuring that both parties have a fair opportunity to present their case and respond to the issues raised by the court. Who could ask for anything better than that?

53 I've discovered that district courts and BAPs will scour a record and trial transcript to figure out what you've been thinking. The quality of your questions provides good tip-offs and revelatory substance to your findings of fact and conclusions of law. More important, when counsel deflect, you may make inferences that their evidence is really not as sound as they think it is.

54 Putting an observation in the form of a question, instead of a declarative sentence, presents the possibility that you are simply seeking clarification, thus eliminating the sometimes-embarrassing backtracking one must make from the bench when you discover you are wrong.

ARTICLE 24

YOUR LAW CLERKS

Always protect your law clerks; they all went to law school, and I view them as my lawyers and trusted advisors. Law clerks are your indispensable allies, playing a pivotal role in a seamless administration of justice, and frankly, they are what make your chambers work. It's hard to explain to outsiders, but the relationship between you and your clerks is symbiotic, fostering an environment where legal acumen, research prowess and diligence converge to shape the foundation of informed and just decisions. Also, they will protect you from the barbarians at the gates.

It was Judge Hungate who told me the real purpose of a law clerk: "It's not my job to tell you when you're wrong; it's your job to tell me when I'm wrong." When that point is pressed onto a new law clerk, they realize for perhaps the first time in their new professional career that they are playing with live ammunition.[55] Another request you should make of a new law clerk as a helpful starting instruction for preparing their bench memoranda is, "Please tell me what I need to know in order to rule; in doing so, make sure you tell me the applicable standard(s) I am required to utilize."[56]

The role of a judge vis-à-vis their law clerks is to first understand that, as generally new lawyers, they are under tremendous pressure to quickly understand the incomprehensible, appreciate what cannot be appreciated in their short careers, and attempt to learn the basics of the bankruptcy system and law as quickly as they can. No one can expect a new lawyer to do this without difficulty, and it is the judge's job

55 As the luckiest judge in the world, I've had, and continue to have, an awesome career law clerk with 18 years of prior serious bankruptcy law experience, 13 years (to date) of career law clerk experience, and the judgment, skill set and empowerment to tell me when I'm full of it. She is truly my colleague in all respects. Bankruptcy judges also have available to them a term law clerk or judicial assistant. Term clerks, in my case chosen by my career clerk, by federal regulatory fiat may only stay four years maximum, and mine have generally chosen to stay between two and a half and four years. On the other hand, some judges prefer two term clerks in the spirit of adding an opportunity for another junior lawyer to experience the role. As Cole Porter once said, "Experiment." They mostly have all departed for new employment with starting salaries of more than my current level, as they definitely deserve.

56 Judge Robert D. Drain (S.D.N.Y., ret.) told me this, and as with so many things, he was right.

to provide support and explanation of what's going on in the courtroom, with the lawyers, and in chambers.[57] Sit down with new law clerks at every opportunity and occasion available to talk about the motions before you, one at a time. Explain the evidence you are seeking to support a motion or complaint, then ask them whether it is possible to rule on the expected record before you. Conduct continual teaching discussions, but don't make them lectures.

They bring into chambers the critical ability to alleviate overwhelming caseloads. Law clerks, armed with legal expertise and analytical skills, will assist you in sifting through voluminous legal documents, conduct thorough research, and synthesize information for you. This not only expedites the decision-making process, it also ensures that you can devote your attention to the more nuanced legal arguments and the application of precedent. There will come a time when your own confidence in their efforts will blossom.

Furthermore, law clerks serve as intellectual companions to you, engaging in rigorous debates and providing fresh perspectives on legal issues.[58] However, you must empower them to speak truth to power.[59] You can try doing it on your own, but the collaborative relationship between your clerks and you will greatly enhance the quality of your judicial opinions. You are not wasting your time investing in your law clerks.

Finally, your law clerks act as a bridge between the bench and the legal community, contributing to the transparency and accessibility of the judicial system. I was banned, from day one, from answering the telephone in my chambers.[60] Law clerks as "duty officers" hold a wealth of information about process, can calm down even the most panicked *pro se* party or associate who has been ordered to perform the

57 "Judge, I don't understand why the secured creditor's counsel during the cash collateral hearing today won't say that his client is underwater, or even say what his client believes the value of the collateral is." "Three words, Tommy: post-petition interest."

58 Do NOT take your work home with you for scintillating discussions over the dinner table. If you have children who are lawyers, don't even think about it. They will simply say, "Thanks, Boomer, but I can't bill this."

59 Remember that speaking truth to power is a skill that evolves over time, and individuals may need ongoing support and mentorship as they navigate these challenges. Foster courage and resilience. Speaking truth to power often requires facing challenges and potential backlash. Help your new law clerks develop the courage to stand up for what they believe in, even in the face of adversity. This will make them better lawyers forever.

60 And I've been chewed out on several occasions with the chambers empty except for me, and like a dolt I picked up a never-ending ringing telephone, regretting it almost immediately.

most impossible tasks by a senior partner, and are masterful at having a caller answer their own questions.

In doing so, law clerks help demystify the legal process for the public and legal practitioners alike, fostering a sense of trust and understanding in the judiciary. Buy their lunches on occasion and listen carefully to their advice.

ARTICLE 25

MEDIATION

Send your cases to mediation and serve as a judicial mediator. Serving as a judicial mediator is just my opinion, so please take the time to read academic literature on the subject, especially presented by the highly respected Prof. Melissa B. Jacoby of the University of North Carolina School of Law, who writes that judicial mediation is fraught with ethical and legal landmines.[61] There is plenty of disagreement on this, so you can make up your own mind on how to proceed.

Bankruptcy case mediation, either privately or judicially conducted, offers several benefits for both debtors and creditors. Mediation can expedite the resolution of disputes compared to traditional litigation. It provides a forum for parties to discuss and negotiate their differences in a more time-efficient manner. It also saves boatloads of money.

It is true that I have "fired" a particular law firm from ever conducting a mediation with me again. During a lively and contested all-day mediation, a senior attorney, in a sudden spurt of honesty, told me to my face that "we're really only here to gather information about the case. We have no interest in settling." I did take another look at their confidential mediation brief, which was quite effusive about their desire to resolve the conflict, then washed my hands of the matter. The ethics of mediation, especially on posturing and downright lying to the mediator and the other parties, has been the subject of many academic papers and provides one more example of the absence of bright lines.

More creative and flexible solutions can be discovered via mediation vs. a court-imposed judgment, and tailored agreements can be more satisfying than a one-size-fits-all court decision. It is my opinion that you should become a skilled mediator and guide the parties in a mediation through the negotiation process, helping them

61 "Other Judges' Cases," *NYU Annual Survey of American Law*, Vol. 78, 2022. Prof. Jacoby makes important points; however, most of the issues she sees can be avoided simply by the mediator being thoughtful during the process. I also note that Prof. Jacoby's findings conclude that more than 80% of bankruptcy judges support and conduct judicial mediation. The crowd has spoken, it seems.

identify common ground and facilitating communication. If you choose to do so, ask your colleagues for opportunities to judicially mediate smaller cases to begin with, then move up to more complex cases from there.

ARTICLE 26

PAYING IT FORWARD

Mentor. Make a difference; make a contribution. Never forget the mission statement you submitted when you decided to apply for your judgeship — and for goodness' sake, always remember those who guided you along the way.

Adopt several strategies to share knowledge, foster professional development, and contribute to the growth of aspiring legal professionals. Join your local Inns of Court and attend regularly. Maintain open and transparent communication with mentees. Encourage them to ask questions, seek guidance and express their concerns. Share practical insights and experiences related to legal practice, court procedures and case management. Offer guidance on effective legal research, writing and advocacy. You've been doing it for years; it is time to pay it forward.

Provide advice on career development, such as choosing a legal specialization, navigating the legal job market and building a professional network. Emphasize the importance of professionalism, ethics and integrity in the legal profession. Share personal experiences that highlight the significance of maintaining high ethical standards.

Offer constructive feedback on legal research, writing and courtroom demeanor. Highlight strengths and areas for improvement to facilitate professional growth. Participate in moot courts as a judge.

Don't forget to share personal anecdotes and experiences that illustrate the challenges and successes you have encountered throughout your legal career. Real-world examples are instructive and relatable, and almost always amusing.

Finally, advocate for diversity and inclusion within the legal community. Encourage mentees to embrace diversity, promote equal opportunities, and contribute to a more inclusive legal profession.

ARTICLE 27

EVOLVING

Never stop (or now start) reading the case advance sheets daily. Subscribe to as many free daily bankruptcy law updates (and news services) as possible. Use your library resource allocations to subscribe to important journals or news outlets. Read them each morning and make it a career-long habit. Forward interesting points, ideas or decisions to your clerks for amplification or simply for recall at a later date. Remember that all law is evolving, and you should evolve with it. Most importantly, you should be directly part of that evolution.

Help Center

American Bankruptcy Institute

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Consumer Practice and Access to Justice

Committee: Consumer Bankruptcy

Karlene Archer

Legal Aid Society of Mid-New York; Syracuse, N.Y.

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November 2021 brought with it a first-of-its-kind, incredibly successful event with ABI's Consumer Practice Extravaganza Nov. 3-12 (CPEX21). Attendees learned about all aspects of consumer bankruptcy practice from intake to post-filing, and from basic chapter 7 cases to cryptocurrency. One common theme may have gone unnoticed, however: access to justice.

Courts have long held that all persons have a constitutional right to file for bankruptcy.[1] This right is not circumscribed if the prospective debtor is short on funds (indeed, aren't all debtors?). Many prospective debtors find themselves without the more than $1,000 needed to pay for an attorney to assist them with a chapter 7 filing, so they either wait for their tax return or file the petition themselves. Waiting can result in further financial difficulties, including garnished wages or repossession, and additional emotional distress in an already difficult time. Filing without an attorney can result in a diminished chance of success, either by failure to discharge individual debts because the filer forgot to list them, or failure to achieve a discharge altogether because the filer didn't complete the requirements.

The U.S. Bankruptcy Court for the Central District of California compiles a comprehensive report of *pro se* filings and successes and has shown that in that district, which oversees between 5 and 10% of the national consumer filings, filings by self-represented litigants are dismissed for incomplete filings at a rate of 36%, and filers receive discharges only in about 64% of cases. While self-represented litigants may have

assistance through electronic self-representation or with a bankruptcy petition-preparer, either of which will increase the debtor's chance of success, it is no comparison to the assistance an attorney can provide.

We heard throughout CPEX21 about various way s to increase the access to justice for those prospective debtors who cannot immediately afford attorneys. During the A.I. and the Future of Your Practice session, we heard about ways that A.I. can streamline the bankruptcy process, in particular petition preparation. That session spoke in particular about Upsolve and how it is helping many *pro se* debtors with "simple" chapter 7 cases better understand and complete the petition. During the Great Debates, we heard about the bifurcation of attorneys' fees in chapter 7, where both sides agreed that there must be some sort of reform to provide better access to attorney assistance, and that fee bifurcation might be one of those reforms. Many panels also discussed *pro bono* work, from successful outcomes to opportunities to areas where it is needed most.

We can all benefit from increased access to the justice provided by bankruptcy and the fresh start. When debtors receive assistance from attorneys, either through up-front assistance prior to the debtor filing *pro se* or through full representation, even creditors may find that the outcome is better, as there is less chance for confusion on either end. When the process is more streamlined, through A.I. or otherwise, the bankruptcy process becomes less time-consuming for attorneys, more accessible for debtors, and easier for everyone all around. And when attorneys invest their time in *pro bono* work in developing areas, such as student loans, they can develop favorable case law and make it easier (and less expensive) for themselves and their future clients down the road.

Each bankruptcy practitioner — both consumer and commercial — should examine how they can increase access to justice. This can be accomplished in many ways. Attorneys can encourage fee bifurcation reform, lend expertise and mentorship to future practitioners, volunteer for local *pro bono* clinics, or take on *pro bono* work. Local bar associations and legal aid organizations often have a range of options for the level of commitment each practitioner has. Additionally, the increase in remote practice since the beginning of the pandemic has increased options for *pro bono* work, including telephonic triage clinics, which help prospective debtors understand whether their best option even is bankruptcy.

We are undoubtedly in a period during which bankruptcy filings are at their lowest levels in recent memory, but we are likely, and hopefully, coming to the end of that period. Foreclosures are about to begin again in earnest, student loan repayments will begin in early 2022, and many people will have to face the medical debt they accrued due to complications of the pandemic. The time to consider access to justice is now.

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[1] *See, e.g., In re Pace Indus. LLC*, No. 20-10927, 2020 Bankr. LEXIS 2266, at *38 (Bankr. D. Del. May 5, 2020).

Help Center

American Bankruptcy Institute

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Ethics Probe into Texas Bankruptcy Judge Ends Following Resignation

A federal judicial ethics probe into former U.S. Bankruptcy Judge **David Jones**'s failure to disclose his romantic relationship with a lawyer whose firm regularly appeared before him has come to an end following the Houston judge's resignation, Reuters reported. The chief judge of the 5th U.S. Circuit Court of Appeals, Priscilla Richman, in an order on Wednesday said that further action was "unnecessary" after Jones last month submitted his resignation as a Southern District of Texas bankruptcy judge. Jones announced plans to resign on Oct. 15 after acknowledging to the *Wall Street Journal* that he had been in a years-long romantic relationship with bankruptcy attorney Elizabeth Freeman and shared a home with her. Freeman until recently worked at Jackson Walker, a local law firm that worked on many corporate bankruptcy cases in Jones' Houston courthouse. Jones's resignation came shortly after the 5th Circuit had launched an ethics inquiry and Judge Richman's filing on Oct. 13 of a misconduct complaint that found there was probable cause to believe Jones violated the codes of conduct that govern judges. Richman's complaint said Jones never recused himself from cases involving Jackson Walker or disclosed his relationship with Freeman. He also approved attorneys' fees sought by the firm for work on matters in which billing records showed Freeman performed "substantial" services, Judge Richman said.
Friday, November 17, 2023

Article Tags: Court Administration Ethics Practice and Procedure

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[+] FEEDBACK

Faculty

Hon. Kevin R. Anderson is a U.S. Bankruptcy Judge for the District of Utah in Salt Lake City, appointed on Sept. 4, 2015. Previously, he served for 17 years as the standing chapter 13 trustee for the District of Utah, administering more than 70,000 chapter 13 cases. Judge Anderson served as president of the National Association of Chapter 13 Trustees (NACTT), and he served on several national committees regarding chapter 13 legislation, rules, forms and policy. He has frequently written and presented on chapter 13 issues, including for the *Norton Bankruptcy Law Advisor*, the *ABI Journal*, the *NACTT Quarterly* and the *NACTT Academy for Consumer Bankruptcy Education*. He also is a Fellow in the American College of Bankruptcy. Prior to his appointment as chapter 13 trustee, Judge Anderson practiced for 13 years as a commercial litigator with an emphasis on civil fraud, real property, and representing chapter 11 and 7 trustees. He also clerked for Hon. David N. Naugle, U.S. Bankruptcy Judge for the Central District of California. Prior to law school, Judge Anderson worked for two years as a data systems specialist testing military and commercial jet engines for General Electric. He received his J.D. *cum laude* from the J. Ruben Clark Law School at Brigham Young University.

Hon. Joel T. Marker is a U.S. Bankruptcy Judge for the District of Utah in Salt Lake City, sworn in on July 1, 2010. Prior to his appointment, he practiced with the Salt Lake City law firm McKay Burton and Thurman for more than 25 years. Judge Marker has served as chair of the Bankruptcy Section of the Utah State Bar and as president of the Utah Bankruptcy Lawyers Forum. He also served as a member of the panel of chapter 7 trustees in the District of Utah from 1997-2010 and represented individuals and businesses in a variety of proceedings before the state and federal courts. Judge Marker received his undergraduate degree from the University of Wisconsin in 1979 and his J.D. in 1984 from the University of Utah College of Law.

Hon. Michael E. Romero is a U.S. Bankruptcy Judge in the District of Colorado in Denver, initially appointed in 2003 and appointed Chief Judge from July 2014-June 2021. He is also Chief Judge of the Tenth Circuit Bankruptcy Appellate Panel. Since becoming a judge, Judge Romero has served on numerous committees and advisory groups for the Administrative Office of the U.S. Courts, is the past chair of the Bankruptcy Judges Advisory Group and has served as the sole bankruptcy court representative/observer to the Judicial Conference of the United States, the governing body for the federal judiciary. He is a past president of the National Conference of Bankruptcy Judges and actively participates in several of its committees. He also serves on the Executive Board of Our Courts, a joint activity between the Colorado Judicial Institute and the Colorado Bar Association that provides programs to further public understanding of the federal and state court systems. Judge Romero is a member of the Colorado Bar Association, ABI, the Historical Society of the Tenth Circuit and the Colorado Hispanic Bar Association. He received his undergraduate degree in economics and political science from Denver University in 1977 and his J.D. from the University of Michigan in 1980.

Hon. William T. Thurman is a U.S. Bankruptcy Judge for the District of Utah in Salt Lake City, appointed in 2001 and now on recall status, and served as its chief judge. He also is a member and former chief judge of the Tenth Circuit Bankruptcy Appellate Panel. Judge Thurman served as a member

of the U.S. Judicial Conference's Code of Conduct Committee and as a member of Conference's Financial Disclosure Committee. He has been active in the National Conference of Bankruptcy Judges, having served on its board and chaired several of its committees. He also has been a frequent speaker for and member of other national and local organizations focusing on lawyer and judicial education and ethical conduct, and he is a Fellow with the American College of Bankruptcy. Prior to his appointment, Judge Thurman was in private practice in Salt Lake City with McKay, Burton & Thurman for 27 years, where he focused on bankruptcy law and served as a panel chapter 7 trustee. He received both his B.A. and J.D. from the University of Utah.