AMERICAN BANKRUPTCY INSTITUTE

2017 Alexander L. Paskay Memorial Bankruptcy Seminar

PLENARY SESSION

Practicing Bankruptcy Law with Excellence: A Master Class in Professionalism and Ethics

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2017

ETHICS ROUNDTABLE

41st Annual Alexander L. Paskay Memorial Bankruptcy Seminar
Thursday, February 2, 2017
3:00 – 4:00 p.m.

Panelists:	Stephen D. Busey, Smith Hulsey & Busey; Jacksonville G. Christopher Meyer, Squire Patton Boggs; Sarasota Harley E. Riedel, Stichter, Riedel, Blain & Postler, P.A.; Tampa
Moderator:	Honorable Roberta A. Colton, U.S. Bankruptcy Court, Middle District of Florida, Orlando Division

Practicing Bankruptcy Law with Excellence: A Master Class in Professionalism and Ethics

The panel will discuss a number of current ethical topics of interest to bankruptcy practitioners. These materials highlight some of the cases and rules that will be raised and discussed.

A. ETHICS OF GHOSTWRITING AND LIMITED REPRESENTATION

Ghostwriting occurs when an attorney drafts a pleading or other legal document for filing by a party who would otherwise appear to be proceeding *pro se*. The "*pro se* party" signs the document—not the attorney.

Federal courts have traditionally held that lawyers violate their duty of candor to the court when they ghostwrite for *pro se* litigants.[1] Comment to Florida Rule of Professional Conduct 4-1.2(c) requires that the attorney state "prepared with the assistance of counsel" on the pleading to at least give the court a heads up that the *pro se* litigant is receiving the assistance of legal counsel.

[1] *E.g.*, *In re Dreamplay*, 534 B.R. 106, 120 (Bankr. D. Md. 2015); *Snyder v. Daugherty*, 899 F. Supp. 2d 391, 414–15 (W.D. Pa. 2012); *In re West*, 338 B.R. 906, 915 (Bankr. N.D. Okla. 2006); *In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Co. 2000); *In re Cash Media Sys., Inc.*, 326 B.R. 655, 673 (Bankr. S.D. Tx 2005).

1. Rules on "Ghostwriting" and Limited Representation

a. Florida Rule of Professional Conduct 4-1.2(c)

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is *reasonable under the circumstances* and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

Comment. If the lawyer assists a *pro se* litigant by *drafting* any document to be submitted to a court, the lawyer is not obligated to sign the document. However, *the lawyer must indicate "Prepared with the assistance of counsel" on the document to avoid misleading the court*, which otherwise might be under the impression that the person, who appears to be proceeding *pro se*, has received no assistance from a lawyer.

b. Model Code of Professional Conduct 1.2(c)

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Comment [6]. The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Comment [7]. Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

2. Completing Petitions and Forms for *Pro se* Debtors

As opposed to drafting a complaint or a motion, an attorney who simply completes a form bankruptcy petition for a debtor, without signing or indicating that the petition was prepared with the assistance of counsel, does not necessarily violate Florida ethical rules against "ghostwriting."

This issue was considered in *Torrens v. Hood (In re Hood)*, 727 F.3d 1360 (11th Cir. 2013). The bankruptcy court initially barred a law firm from practicing before the Bankruptcy Court for the Southern District of Florida for six months and referred the matter to the United States Attorney for potential violation of 18 U.S.C. § 157(3), after finding that completing a bankruptcy petition for the debtor constituted ghostwriting and fraud. *Id.* at 1363. The Eleventh Circuit reversed, finding that the firm's action was not "ghostwriting" within the meaning of Florida's Rules of Professional Conduct. *Id.* at 1365. Simply filling out a form did not rise to the level of undisclosed, prohibited attorney drafting. *Id.* Also, the firm's conduct was not fraudulent because no showing was made that any information included in the petition was false. *Id.*

3. Limited Representation Agreements

Ghostwriting issues can arise when attorneys try to limit their representation of a debtor to certain tasks. In a limited representation agreement, debtor's counsel may agree to provide basic bankruptcy services while excluding representation of the debtor in other (usually contested) matters, such as adversary proceedings.

Ethical pitfalls can arise when this type of "unbundling" is attempted. If the attorney attempts to "help" the debtor in matters outside the scope of agreed representation without observing proper protocols, anti-ghostwriting rules may be implicated. Similar issues may arise when a limited representation agreement attempts to exclude basic bankruptcy services, such as representation at the meeting of creditors.

In *Ruiz*, for example, debtor's counsel agreed to provide services beyond mere preparation of the petition and schedules, such as providing continuous advice throughout the case and after discharge. *In re Ruiz*, 515 B.R. 362, 363–64 (Bankr. M.D. Fla. 2014). The court ordered the attorney to turn over its fee, finding that the limited representation agreement was prohibited by Florida Rule of Professional Conduct 4-1.2(c). *Id.* at 368–69. Further, the attorney violated Local Rule 2091-1 of the Bankruptcy Court for the Middle District of Florida by failing to sign the petition and failing to attend the 341 meeting and hearings. *Id.*

4. Out-of-State Practitioners

Ghostwriting from out-of-state is particularly perilous. In *Dreamplay*, an attorney not licensed in the forum state of the bankruptcy court assisted the debtor in preparing bankruptcy motions throughout the case. *In re Dreamplay, Inc.*, 534 B.R. 106, 118–20 (Bankr. D. Md. 2015). The attorney did not sign the papers but did include footnotes indicating that he was assisting the debtor. *Id.* The court imposed severe disciplinary sanctions on the attorney for (1) violating Fed. R. Bankr. P. 9011 by not signing papers, (2) practicing law before the court without seeking *pro hac vice* admission, and (3) "ghostwriting," though the presence of footnotes disclosing the attorney's assistance was found to be a mitigating factor. *Id.*

B. ETHICS OF REAFFIRMATION AGREEMENTS

As discussed above, limited representation agreements have been used by consumer bankruptcy attorneys to reduce the scope of services to a debtor. On one hand, such "unbundling" of services permits debtors to obtain at least some basic representation at a reduced cost. On the other hand, "unbundling" often leads to confusion when the debtor, the court, and the creditors struggle through a partial representation.

Both the Model and Florida Rules of Professional Conduct permit limiting the scope of legal representation, so long as it is reasonable and does not cause the attorney to impinge upon other duties owed to a client. Here in the Middle District Florida, Local Rule 2091-1 requires debtor's counsel to attend all hearings that debtor is required to attend, unless the attorney obtains court approval to withdraw:

> Unless the Court has permitted the withdrawal of the attorney under Local Rule 2091-2, an attorney who files a petition on behalf of a debtor shall attend all hearings in the case that the debtor is required to attend under any provision of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, these rules, or order of the Court. However, counsel need not attend a hearing regarding a matter to which the debtor is not a party and whose attendance has only been required as a witness.

1. Firm Policy to Not Represent Debtors in Connection with Reaffirmation Agreements

What happens if a lawyer or law firm decides to simply not represent debtors in the reaffirmation process? Such was the case in *In re Collmar*, 417 B.R. 920 (Bankr. N.D. Ind. 2009).

In *Collmar*, the law firm of debtor's attorney had an express policy against representing debtors in connection with reaffirmation agreements. *Id.* at 922. As a

result, the attorney did not negotiate the agreement or attend the reaffirmation hearing. *Id.* The court analyzed the firm's policy under Indiana Rule of Professional Conduct 1.2(c), which—like Florida Rule 4-1.2(c) and Model Rule 1.2(c)—allows an attorney to "limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." *Id.* The court ultimately held that excluding reaffirmation agreements and the reaffirmation process from the scope of counsel's representation was not a permissibly reasonable limitation. *Id.* at 923. Debtor's counsel is obligated to help debtor make peace with creditors and achieve a fresh start by assisting throughout the bankruptcy. *Id.* The court reasoned that the reaffirmation process is an "integral part of reordering affairs and making the peace with creditors that is debtor's ultimate bankruptcy goal." *Id.*

2. Fulfilling Agreement to Attend Reaffirmation Hearings

An attorney certainly must provide all agreed upon services. In *DeSantis*, debtor's counsel filed a disclosure of compensation that specifically referenced an agreement to prepare and file reaffirmations. *In re DeSantis*, 395 B.R. 162, 165 (Bankr. M.D. Fla. 2008). In fact, counsel not only failed to assist with the debtor's reaffirmation of a credit union loan, counsel ignored the credit union's request for consent to negotiate with debtor directly. *Id. at 166.* As a result, the loan was not reaffirmed. *Id.* When the debtor failed to surrender the collateral, the credit union filed a motion to dismiss. *Id.* at 166–67. Debtor eventually complied, and the motion was withdrawn. *Id.* at 167. The court sanctioned debtor's counsel in the amount of the credit union's attorney's fees and costs for counsel's failure to provide the agreed services and adequate representation. *Id.* at 172. Counsel should have either performed or sought court approval to withdraw. *Id.* at 168–69.

3. Risks of Malpractice from Reaffirmation Agreements

Sometimes counsel will assist the debtor in negotiating the reaffirmation agreement, but will then either refuse to sign or refuse to make one of the required certifications. Debtors' attorneys are torn between providing full representation and helping clients keep their homes or cars on the one hand, and signing off on something that conflicts with sound professional, legal judgment on the other.

Obviously, if the attorney believes that reaffirmation is not in the debtor's best interest, the attorney should not sign and "vouch" for the agreement. But frequently, the reason advanced for not signing a reaffirmation has little to do with the debtor's best interest; it is simply counsel's fear of future malpractice liability.

Such fear may be overstated. Certainly, debtor's counsel cannot be negligent in handling a reaffirmation liability and duly advising the debtor. But even with that, malpractice liability associated with reaffirmation advice seems quite rare.

We could find only one published opinion and, in that case, the lawyer won. Ironically, the attorney was saved by the reaffirmation agreement's failure to satisfy the statutory requirements for enforceability.

In *Klein v. Duren Law Offices, LLC*, counsel advised the debtors that they would need to enter a reaffirmation agreement with the bank holding the second mortgage if they wanted to keep their home. *Klein v. Duren Law Offices, LLC*, 846 N.W.2d 34, *1 (Wis. Ct. App. 2014). Unfortunately, debtors failed to successfully modify the first mortgage, which likely resulted in a foreclosure. *Id.* at *2. Unable to fully recover from the foreclosure proceeds and armed with the reaffirmation agreement, the bank holding the second mortgage sued the debtors for the deficiency. *Id.* Rather than contest the suit, the debtors settled with the bank and then sued their bankruptcy attorney for malpractice, hoping to recoup the settlement expense. *Id.*

The trial court found that the reaffirmation agreement was unenforceable under 11 U.S.C. § 524(c)(2) because debtors failed to complete "Part D," which requires debtors acknowledge certain disclosures with their signatures. *Id.* at *4. The trial court concluded that the jury would be instructed on the agreement's unenforceability. *Id.* at * 1. Thus, the bank's deficiency claim was without merit and the attorney's advice could not be the cause of the debtors' damages. The trial court's decision was affirmed. *Id.* at *8.

C. ETHICS OF REPRESENTING INSIDERS AND AFFILIATES IN CHAPTER 11 CASES

1. Bankruptcy Code Provisions

Under sections 1107 and 327(a), a debtor-in-possession may employ professionals "that do not hold or represent an interest adverse to the estate, and that are disinterested persons . . . ." Section 101(14)(C) defines a "disinterested person" as one that "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship[s] . . . ."

Though "interest materially adverse" is not defined in the Bankruptcy Code, an adverse interest exists when a professional

> possess[es], or serv[es] as an attorney for a person possessing, either an economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant . . . or . . . a predisposition under the circumstances that render such a bias against the estate.

Marine Realty, Inc. v. Marina Mile Shipyard, Inc. (In re New River Dry Dock, Inc.), 497 F. App'x 882, 887 (11th Cir. 2012) (quoting *Electro-Wire Prods., Inc. v. Sirote & Permutt, P.C., (In re Prince)*, 40 F.3d 356, 361 (11th Cir. 1994)).

2. Simultaneous Representation of Major Shareholder and Company

It is difficult to imagine any case in which no conflict would arise from simultaneous representation of a company and its principal in separate bankruptcies. There may be common creditors. The principal may have guaranteed or provided collateral for loans to the company, or may have directly loaned money or leased property to the company. And of course, the principal will have equity interest in the company.

These types of conflicts led the court in *Straughn* to require an attorney to choose between representing a company or its major shareholder in their respective chapter 11 cases. *In re Straughn*, 428 B.R. 618, 628 (Bankr. W.D. Pa. 2010). Both debtors took sincere steps to avoid conflicts. They both agreed to waive any conflict and testified that neither bankruptcy was dependent on the other's success. *Id.* at 623, 627. The shareholder had never drawn a salary, other compensation, or assets from the company. *Id.* at 622. In fact, the shareholder even testified that she did not intend to collect any receivables owed to her by the company, that she would waive any claims she may have had, and that she would surrender her shares for the stated par value of $1. *Id.* at 625.

Unfortunately, the shareholder's attempts to avoid conflicts could themselves give rise to other conflicts. *Id.* at 625–26. The shareholder's waiver of claims against the company would serve to harm her own creditors and benefit the company's creditors. *Id.* at 625. Similarly, the shareholder's surrender of her shares for par value would harm her own creditors if the company successfully reorganized. *Id.* at 626. The impact on creditors is a critical consideration because "[a]n attorney for the debtor-in-possession has a fiduciary duty not only to the debtor, but has a fiduciary obligation to act in the best interest of the entire estate, including creditors." *Id.* at 625–26 (quoting *In re N. John Cunzolo Assocs., Inc.*, 423 B.R. 735, 739 n.5 (Bankr. W.D. Pa. 2010)).

The court noted that, in most of these cases, conflicts will prevent an attorney from representing both debtors. *Id.* at 627–28. Conflicts will likely arise over shareholder's salary, rental payments between the parties, "joint liabilities or liabilities for which the shareholder serves as co-obligor or guarantor, a debtor-creditor relationship between the parties, or situations in which transfers between the parties have occurred prior to the filing date." *Id.*

In contrast, the Third Circuit in *Jade Management Services* upheld the bankruptcy court's approval of counsel's simultaneous representation of a company and its major shareholder in two separate bankruptcy cases. *In re Jade Mgmt. Servs.*, 386 F. App'x 145, 152 (3d Cir. 2010). There, the shareholder guaranteed the company's secured debt. *Id.* at 149. Because the value of the company far exceeded its secured debt, "it appeared substantially certain that all secured claims would be satisfied in full . . . ." *Id.* The bankruptcy court found that simultaneous representation was merely a potential conflict with a remote possibility of becoming an actual conflict, thereby justifying counsel's employment for both debtors. *Id.*

3. Counsel's Prior Relationship with Debtor and Principals

An attorney who is familiar with a company's dealings might be in the best position to guide the company through bankruptcy in an efficient and cost-effective manner. But when dealing with a closely held company, familiarity with a company's dealings is often accompanied by a good personal relationship with the company's principal. It would even be natural for the attorney to act as the principal's go-to counsel for all its legal needs. This may become problematic when the attorney seeks to represent the debtor-in-possession in the company's bankruptcy.

In *Cunzolo*, proposed counsel for the debtor-in-possession had represented the debtor, its sole shareholder, and other business interests of the shareholder for roughly 30 years in various legal matters. *In re N. John Cunzolo Assocs., Inc.*, 423 B.R. 735, 737–38 (Bankr. W.D. Pa. 2010). During the preference period, in a transaction not involving proposed counsel, the debtor had transferred most of its assets to the shareholder's wife and a new limited liability company. *Id.* at 738. This transaction stripped the debtor of most of its assets, making reorganization an impossibility and leaving creditors with potential claims against the transferees. *Id.* at 738–39. The court disapproved the application for employment, finding that counsel held an interest adverse to the estate and was not disinterested. *Id.* The finding was based on counsel's relationship with the shareholder and his indirect relationship with the shareholder's wife and stepson, who held equity in the transferee company. *Id.* at 739. Notably, the court made no finding that counsel ever worked personally with the shareholder's wife or stepson. But his close connection to the shareholder was sufficient to contaminate his judgment towards the transferees in the eyes of the court and disqualify him from employment. *Id.* at 738.

4. Representing Multiple Companies in Administratively Consolidated Chapter 11 Cases

In multi-debtor cases, it may be economic and efficient to appoint a single firm to represent the related debtors, which could consist of principals and their companies or parent-companies and their subsidiaries. But with multiple related debtors comes an increased likelihood of conflict. There may be inter-debtor claims and guarantees.

Principals may have transferred money from healthy debtors to underperforming debtors to fund operations.

The existence of inter-debtor claims, however, is not an "automatic ground for disqualification of counsel for the trustee" or debtor-in-possession. *In re BH & P, Inc.*, 949 F.2d 1300, 1314–15 (3rd Cir. 1991). Section 327(c) of the Bankruptcy Code provides that a "person is not disqualified for employment under [section 327] solely because of such person's employment by or representation of a creditor." But if there is an objection, "the court shall disapprove such employment if there is an actual conflict of interest." *Id.*

A factual, case-by-case analysis should be used in determining whether counsel can simultaneously represent multiple related debtors. Factors considered may include "the nature of disclosure of the conflict made at the time of appointment, whether the interests of the related estates are parallel or conflicting, and the nature of the interdebtor claims made." *In re BH & P*, 949 F.2d at 1316. Any analysis should seek to balance "efficiency and economy" with "fairness to all parties involved and protection of the integrity of the bankruptcy process." *Id.*

The inter-debtor conflicts arise in administratively consolidated cases because debtors maintain their separate identities, assets, claims, and creditors. But in substantively consolidated cases, these conflicts become moot because the debtors effectively merge into one. Interestingly though, the filing of a motion for substantive consolidation can itself create a disqualifying conflict for an attorney representing multiple debtors. This is what happened in *In re Raymond Prof'l Grp., Inc.*, 421 B.R. 891 (Bankr. N.D. Ill. 2009). The facts in that case are extensive and complicated. Basically, substantive consolidation posed the risk of drastically reducing the claims of creditors to subsidiary-debtor. *Id.* at 905. The court therefore found the attorney's motion for substantive consolidation to violate his fiduciary duty to the estate of the subsidiary-debtor. *Id.* Counsel's disqualification, however, was limited to the motion for substantive consolidation. *Id.*

5. Representing Debtor when Primary Secured Creditor is Regular Client of Firm

A firm seeking to represent a debtor in a case involving a current or former creditor client must take precautions to avoid violating Rules of Professional Conduct. Florida Rule 4-1.7(a) prohibits a lawyer from representing a client if it would be directly adverse to another client or if "there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client [or] a former client . . . ." *Accord* Model Rule 1.7(2). With respect to former clients in particular, an attorney may not "represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client . . . ." Florida Rule 4-1.9;

accord Model Rule 1.9(a). Even if these standards appear satisfied, counsel would be wise to obtain informed written consent from the debtor and its former and current creditor clients. Florida Rules 4-1.7(b)(4), 4-1.9(a); *accord* Model Rules 1.7(b)(4); 1.9(a).

With respect to Bankruptcy Code requirements, a firm is not automatically barred from representing a debtor solely because it represents or represented a creditor. 11 U.S.C. § 327(c). Rather, "the court shall disapprove such employment if there is an actual conflict of interest." *Id.* An "actual conflict" may exist if counsel holds actively competing interests, where service of one interest comes at the expense of the other. *In re Fullenkamp*, 477 B.R. 826, 832 (Bankr. M.D. Fla. 2011). It may also exist where the multiple representations force counsel to deviate from the strategy or conduct it would adopt if it represented only the debtor. *Id.*

Qualifying for employment as debtor's counsel will be difficult when a large creditor is a regular client of counsel's firm.

In *Premier Farms*, the debtor sought to employ a large firm. *In re Premier Farms L.C.*, 305 B.R. 717, 719 (Bankr. N.D. Iowa 2003). The firm disclosed that it represented the debtor's largest and only secured creditor in unrelated matters, representing .0002% and .0003% of the firm's total billings in the two years before debtor filed bankruptcy. *Id.* The firm's employment application was disapproved based on a "potential, if not actual, conflict." *Id.* at 720. Because the creditor was debtor's largest and only secured creditor, debtor's counsel would have to be particularly zealous in its dealings with the creditor's counsel. *Id.* In questioning whether debtor's counsel would be up to the task, the court focused on the fact that, unlike the debtor, the secured creditor was a regular client of the firm. *Id.* at 721. Counsel's desire to maintain good relations with the creditor could adversely impact its handling of the estate and its ability to protect the interests of the estate and unsecured creditors. *Id.*

6. Mechanics of Investigating Conflicts in Preparing Disclosure

An attorney seeking to represent a debtor-in-possession or trustee must submit a verified statement disclosing all "connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a). Disclosing "connections" requires more than disclosing facts or interests that counsel believes to be critical under § 327(a). *In re Gluth Bros. Const., Inc.*, 459 B.R. 351, 364 (Bankr. N.D. Ill. 2011) ("The term 'connections' used in Rule 2014(a) is considerably broader than the terms 'disinterested' and 'interest adverse to the estate' used in Section 327(a)."). Nondisclosure, whether intentional or negligent, may result in disqualification, a denial of fees and expenses incurred, or a disgorgement of all fees received. This is true even if the disclosure would not have

resulted in disqualification of the attorney's employment. *E.g.*, *In re of Hutch Holdings, Inc.*, 532 B.R. 866, 879 (Bankr. S.D. Ga. 2015); *In re Gluth Bros. Const.*, 459 B.R. at 365.

An attorney who is permitted to represent a debtor must take precautions to remain disinterested and avoid holding interests that are adverse to the estate. Otherwise, the court may deny *all* compensation under section 328(c) of the Bankruptcy Code. *See Tenzer Greenblatt LLP v. Silverman (In re Angelika Films 57th, Inc.)*, 246 B.R. 176, 180–81 (S.D.N.Y. 2000) (affirming denial of all compensation where counsel for debtor-in-possession filed motion for assignment of lease to debtor's principal for substantially less than the value of the lease). Moreover, the obligation to disclose continues throughout the case. So it is a good practice to periodically review disclosures, particularly as new parties appear in the bankruptcy case or in adversary proceedings.

One last thing to note is that the material connections must be clear from the disclosure statement itself. It is not enough that the record as a whole reveals counsel's connections. "Bankruptcy courts are not obliged to hunt around and ferret through thousands of pages in search of the basic disclosures required by Rule 2014." *Quarles and Brady LLP v. Maxfield (In re Jennings)*, 199 F. App'x 845, 848 (11th Cir. 2006).

7. Role of Conflicts Counsel

Debtor's counsel may find that it has a potential conflict with a small number of the debtor's many creditors. In such cases, employment may still be approved with the caveat that a separate attorney (*i.e.*, "conflicts counsel") will be retained for the specific purpose of investigating, pursuing, or defending claims relating to the conflicting creditors. In such cases, debtor's counsel should obtain consent waivers from any creditor with whom it may have a potential conflict.

Of course, the use of conflicts counsel will not always suffice to avoid disqualification, specifically "where the proposed general bankruptcy counsel has a conflict of interest with a creditor that is central to the debtor's reorganization." *In re Project Orange Assocs., LLC*, 431 B.R. 363, 375 (Bankr. S.D.N.Y. 2010).

D. ETHICS OF REPRESENTING MULTIPLE CREDITORS

1. Governing Rules

Bankruptcy courts have less power to guard against conflicts in creditor representations than debtor representations. In general, court approval is not required for employment by creditors. Further, the 2011 amendments to Bankruptcy Rule 2019 narrowed the circumstances under which an attorney representing

multiple creditors is required to file a disclosure statement. Prior to the amendments, "every entity . . . representing more than one creditor" was required to file a verified disclosure statement. Today, Rule 2019 applies only if the creditors are "(A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another."

Nevertheless, bankruptcy courts retain the authority to enforce rules of professional conduct against professionals appearing before the court. *Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm.*, 321 B.R. 147, 163–64 (D.N.J. 2005). Florida Rule of Professional Conduct 4-1.7(a) prohibits representation of a client if

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

Accord Model Rule 1.7(a). Given the number of potential conflicts, attorneys representing multiple creditors will likely fail to satisfy these two requirements and will thus need to satisfy the exception provided in Florida Rule 4-1.7(b):

> Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

Accord Model Rule 1.7(b). Finally, Florida Rule 4-1.7(c) provides that "[w]hen representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved."

2. Potential Conflicts

The simultaneous representation of multiple creditors may produce challenges where, as in so many cases, the bankruptcy morphs into a zero-sum game. Unless a debtor has sufficient capital to satisfy all claims, each allowed claim will reduce a creditor's slice of the pie. The attorney will be in a tough position because what is good for one creditor may become harmful to another.

Representation of a secured creditor and an unsecured creditor can cause issues if the unsecured creditor will benefit from a challenge to the perfection of the

secured creditor's security interest or from the subordination of the secured claim. There are fewer conflicts in representing similarly situated creditors, but even then, counsel should be alert to potential conflicts; for example, when representing two unsecured creditors and an objection has been filed to one of the claims—in the context of a pot plan. This situation might not require any type of disqualification but may require notice to both parties.

Common sense and attention to potential conflicts are key to any analysis. The following guidelines help navigate multiple representations: (i) make a full and complete disclosure of the scope and nature of the representations to all affected clients; and (ii) acknowledge that the attorney may have to withdraw from both representations if an actual conflict arises.

E. DEALING WITH *PRO SE* PARTIES[2]

1. Ethical Rules

a. The Adverse Pro se *Party*

To mitigate the risk of an ethical breach in dealing with unrepresented persons, bankruptcy lawyers should be familiar with the ethics rule regarding dealings with unrepresented persons. In Florida, Rule 4-4.3 of the Rules of Professional Responsibility states:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
>
> COMMENT:
>
> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

This is modeled after the ABA's *Model Rules of Professional Conduct*, Rule 4.3.

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[2] The material in this section, "Dealing with *Pro se* Parties," is from a presentation made at a Central Florida Bankruptcy Law Association seminar, titled "Ethical Issues in Dealing with Unrepresented Parties in Bankruptcy Proceedings." The authors are Professor Jeffrey Davis and Harley Riedel.

b. Your Own Client

Dealing with the unrepresented party is only part of the lawyer's concern. The lawyer has, of course, his or her own client. On the creditor side, the client is often, but not necessarily, a bank or other sophisticated financial institution. Some of these institutions may spread their work out among several firms, each of which in a sense is competing for the client's business. On the debtor side, the client may be a large corporation involved in a complex chapter 11 case. Or the client may be a chapter 7 trustee. Whether sophisticated or not, the client wants some relief, such as:

(a) in the case of a creditor, the payment of amounts owed, including the resumption of monthly payments, or the return of the collateral from the *pro se* debtor;
(b) in the case of a creditor a money judgment or a judgment of nondischargability;
(c) in the case of a corporate chapter 11 debtor, goods or services vital to the continuation of the debtor's business during the case;
(d) in the case of a corporate chapter 11 debtor, votes in favor of the plan of reorganization;
(e) in the case of a chapter 7 trustee, turnover of property or disallowance of exemptions.

And the client invariably wants this relief quickly and inexpensively. In each case the client will (or at least thinks it will) suffer damage if the relief is not obtained. Behind the scenes, as all practicing lawyers know, the lawyer has the day-to-day practical business issue of trying to earn the client's confidence and keep its business. More on this issue later.

But first, the lawyer must be familiar with the ethics rules as to dealings with his or her own clients, none of which themselves contain any explicit exception for dealings with *pro se* adverse parties. The Preamble to the Rules of Professional Responsibility provides:

> As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.

Further, a lawyer must abide by his or her client's instructions, consistent with other ethical responsibilities. *See* Rule 4-1.2 ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.")

So, lawyers dealing with unrepresented parties must be able to explain to their own clients any special rules related to that situation.

2. Rule 4-4.3: Dealings with the *Pro se* Party

Rule 4-4.3 has two components. The first requires that a lawyer who is representing a client in dealing with an unrepresented person not state or imply that the lawyer is disinterested. If the lawyer knows or suspects that the unrepresented person misunderstands the lawyer's role, the lawyer must endeavor to correct the misunderstanding. A lawyer must act reasonably in recognizing whether a misunderstanding has arisen and in correcting any misunderstanding. In truly adversary situations, where your client has sued the *pro se* party, the risk of appearing disinterested is less than in non-confrontational circumstances, perhaps the vendor in the first hypothetical or a secured creditor dealing with a *pro se* debtor in a reaffirmation context where the debtor wants to keep the collateral securing the debt.

The second component of Rule 4-4.3 generally prohibits a lawyer from giving legal advice to the unrepresented person if the interests of the unrepresented person actually or potentially conflict with the interests of the lawyer's client. Again, the lawyer must act reasonably in recognizing whether an actual or potential conflict exits. The only exception to the prohibition on giving legal advice is that the lawyer may advise the unrepresented person to engage counsel.

A lawyer can take affirmative steps to avoid violation of the first component of Rule 4-4.3 by clearly communicating the lawyer's role. For example, a lawyer representing a secured creditor in a bankruptcy case filed by a *pro se* debtor might inform the debtor in writing that the lawyer represents the secured creditor and that the lawyer does not represent the debtor. Failing to clearly communicate the lawyer's role may result in a violation of this rule.

3. The Settlement Conundrum

"Public policy strongly favors pretrial settlement in all types of litigation because such cases, depending on their complexity, can occupy a court's docket for years on end, depleting the resources of parties and the taxpayers while rendering meaningful relief increasingly elusive." *Shearson Lehman Brothers, Inc. v. Munford, Inc. (In re Munford)*, 97 F.3d 449, 455 (11th Cir. 1996). The normal settlement dynamic involves two or more lawyers explaining the strengths and weaknesses of their cases to each other. Is this a prohibited expression of the lawyer's views in the context of a *pro se* litigant?

Assuring compliance with the prohibition on providing legal advice is difficult because the term "legal advice" is not defined in Rule 4-4.3. To the contrary, the comment to Rule 4.3 indicates that determining whether information constitutes "legal advice" requires a subjective analysis. The comment provides that determining whether advice is impermissible "may depend on the experience and sophistication of

the unrepresented person, as well as the setting in which the behavior and comments occur."

The comment does provide counsel with some comfort in recognizing that Rule 4-4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person, provided counsel abides by the first component of the rule by clearly explaining that the lawyer represents an adverse party and is not representing the person. Thereafter, in this limited context, the lawyer may further explain "the lawyer's own view" as to the meaning of the settlement documents or "the lawyer's view of the underlying legal obligations." This aspect of the comment may be particularly helpful to counsel in effecting a reaffirmation agreement from a *pro se* debtor.

Unfortunately, the comment does not address the question of whether counsel may provide an unrepresented adversary with "the lawyer's view" on other issues such as the merits of an unrepresented person's adverse position. For example, may counsel offer to an unrepresented debtor the lawyer's "view" that the lawyer's client is entitled to relief from the automatic stay?

Given that Rule 4-4.3 focuses on avoiding the false impression that the lawyer is acting in accordance with the unrepresented party's interests or is neutral in the dispute, the lawyer may be free to advocate the client's position in communications with an unrepresented person without violating the rule so long as the communication clearly explains the lawyer's role as an advocate for the secured creditor. Unfortunately, in light of the vagueness of Rule 4-4.3's prohibition on giving legal advice, some have suggested that a lawyer's dealing with the unrepresented persons can best avoid a violation of the Rule 4-4.3 by limiting legal arguments to formal pleadings.

Court ordered mediation may help solve this issue, as the mediator can monitor the flow of information. For indigent *pro se* parties, some mediators may waive the portion of the fee attributable to the unrepresented party.

F. ETHICS OF E-DISCOVERY

Advances in technology have presented many ethical challenges as attorneys work through the complexities of e-discovery. As bankruptcies trigger more and more litigation, bankruptcy attorneys have to become well versed in issues of ESI (Electronically Stored Information).

1. Competent Representation

The very first ethical rule for any attorney is the rule requiring competent representation. In today's legal setting, competent representation requires an

understanding of the legal and technological processes involved in e-discovery. *See generally Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 259 F.R.D. 568 (M.D. Fla. 2009).

Lawyers involved in handling ESI must learn not just the technology, but the entire e-discovery process, from preservation to collection to production. Each of these steps has a technological component in today's digital world.

In Florida, attorneys now have a technology requirement in their CLE training. *In re Amendments to Rules Regulating the Florida Bar 4-1.1 and 6-10.3*, 200 So. 3d 1225, 1227 (Fla. 2016).

2. Reasonable Inquiry and Duty to Preserve

Federal Rule of Civil Procedure 26(g) imposes a duty of "reasonable inquiry" with respect to any discovery request of response.

Federal Rule of Civil Procedure 26(f) directs a planning meeting "to discuss any issues about preserving discoverable information."

For an attorney taking on a chapter 11 corporate representation, these duties require the following:

- Learning about the potential debtor's electronic filing system.
- Litigation hold letter.
- Potential First Day Motion to address ESI and sharing information with creditors and others so as not to waive privileges for future litigation.

3. Duty to Not be a Jerk

Recent amendments to Rule 1 and Rule 26 of the Federal Rules of Civil Procedure make clear that cooperation and proportionality are here to stay.

Rule 1 states that both the court and the parties must administer the rules to obtain a just, speedy and inexpensive determination of every action and proceeding.

Rule 26 states that discovery requests must be proportional to the needs of the case, considering the importance of the issues at stake, the parties' relative access to information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

This duty is also embraced by the State of Florida in the amendment to the attorney's "Oath of Office." The Oath now includes the following statement: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." *In re The Florida Bar*, 73 So. 3d 149 (Mem), 150 (Fla. 2011).