AMERICAN BANKRUPTCY INSTITUTE

2020 Alexander L. Paskay Memorial Bankruptcy Seminar

PLENARY SESSION

WWJGD (What Would Judge Glenn Do)?...

Hon. Catherine P. McEwen, Moderator
U.S. Bankruptcy Court (M.D. Fla.); Tampa

Jacob A. Brown
Akerman LLP; Jacksonville

Betsy C. Cox
Rogers Towers, PA; Jacksonville

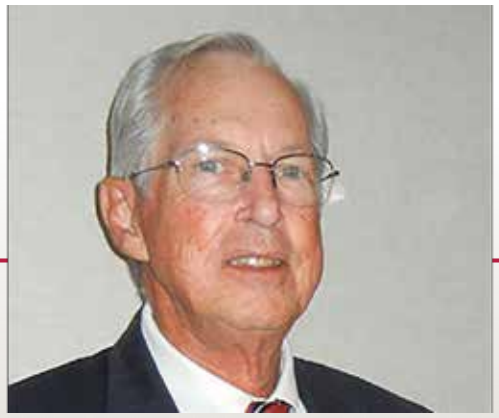
Prof. Roberta Kemp Flowers (invited)
Stetson University College of Law; Gulfport

Jerry M. Markowitz
Markowitz Ringel Trusty + Hartog, P.A.; Miami

2020

WWJGD?

WHAT WOULD JUDGE GLENN DO?

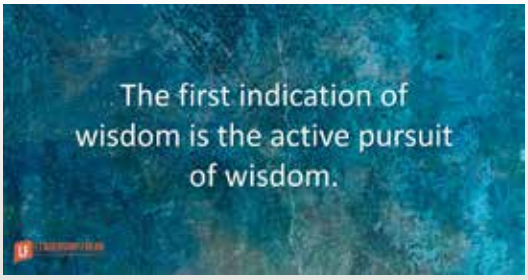


INTRODUCTIONS

Hon. Catherine Peek McEwen, Moderator
Jacob A. Brown
Betsy C. Cox
Professor Roberta Kemp Flowers
Jerry M. Markowitz

REMEMBERING THE WISDOM OF JUDGE GLENN

- Maintaining one's reputation is of primary importance
- Mentoring and helping other lawyers is essential to the legal profession
- To be competent a lawyer must keep up with the Bar Rules on advertising
- Disclosure of potential conflicts of interest is required in an application for retention of professionals.



SCOPE OF THE ATTORNEY-CLIENT RELATIONSHIP, UNBUNDLING, & GHOSTWRITING

WWJGD?

- Ms. Shingle-Hanger, a lawyer, provides pre-petition legal services to a debtor in the form of filling out a chapter 7 petition, schedules, SOFA, SOI, and means test. Before she starts preparing the forms, Ms. Shingle-Hanger charges and collects $500 from the debtor for this work.

- Ms. Shingle-Hanger will not provide post-petition services to the debtor because the debtor cannot afford to pay for such services.
- The debtor agrees to this arrangement during the debtor's first consultation with Ms. Shingle-Hanger.
- The case is commenced about two weeks after their first consultation.

- May Ms. Shingle-Hanger ethically render only the pre-petition services?

UNBUNDLING PERMITTED OR NOT?

- The Model Rules of Professional Conduct provide that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Model Rules of Prof'l Conduct R. 1.2(c).

- However, the Rules Regulating the Florida Bar, Rules of Professional Conduct differ in three ways, one being more broad and the others more restrictive: (i) the **limitation may apply to** the **objectives** of the representation as well as **the scope**, (ii) the client must **agree in writing**, and (iii) the limitation **must comply with applicable law and rules**. R. Regulating Fla. Bar 4-1.2(c).

CHECK THE LOCAL RULES!

- Rule 2091-1 of the Local Rules of the United States Bankruptcy Court for the Middle District of Florida does not permit unbundling absent court approval if the attorney **files** the petition.

- *Cf.* Bankr. N.D. Fla. R. 2090-1 D. (1); Bankr. S.D. Fla. R. 2090-1(E).

CAVEAT: THE LORE (A RULE OF REASON)

- Would it be an abuse of discretion for the bankruptcy court to deny Ms. Shingle-Hanger permission to unbundle her services such that she is excused from performing any post-petition work? Should it really matter whether Ms. Shingle-Hanger files the petition?
- *See In re Ruiz*, 515 B.R. 362 (Bankr. M.D. Fla. 2014).

WWJGD?

- Ms. Shingle-Hanger does not disclose on the record that she prepared the forms.

- Does Ms. Shingle-Hanger's failure to disclose the pre-petition preparation of the forms present an ethical problem?

GHOSTWRITING PERMITTED OR NOT?

- In Florida, the Rules Regulating the Florida Bar treat ghostwriting as incompatible with the admonitions that that "[a] lawyer shall not . . . make a false statement of fact or law to a tribunal," R. Regulating Fla. Bar 4-3.3(a)(1), and "shall not . . . engage in conduct involving dishonesty, fraud, **deceit, or misrepresentation**." *Id.* at 4-8.4(c).

- Although a lawyer who "assists a pro se litigant by drafting any document to be submitted to a court, [need not] sign the document" id. at 4-1.2(c) cmt, "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." Id. at 4-1.2(c).

WHY DOES DISCLOSURE MATTER?

- In some federal circuits, trial judges must give pro se litigants more leeway than those represented by counsel. For example, The United States Court of Appeals for the Eleventh Circuit instructs trial judges to treat pro se litigants with "special care" because they "'occupy a position significantly different from that occupied by litigants represented by counsel.'" *Johnson v. Pullman, Inc.*, 845 F.2d 911, 914 (11th Cir. 1988) (quoting *Moore v. Florida*, 703 F.2d 516, 520 (11th Cir. 1983)).

- The court in *Johnson* reasoned that "[g]iven the unique status of pro se litigants in our court system," it would be inappropriate in pro se cases to automatically apply the rules the same way as "in cases where parties are represented by attorneys presumably schooled in established court procedures." *Id.* Hence, an ostensibly pro se party who has been assisted by unidentified counsel might gain an unwarranted advantage in the form of leniency if the ghostwriting remains undisclosed.

EXCEPTION FOR FILL-IN-THE BLANK WITH NO ADVICE

- *See Torrens v. Hood (In re Hood)*, 727 F.3d 1360 (11th Cir. 2013) (firm completing a "fill-in the-blank" standard form document did not "draft" the document and thus did not commit fraud on the court by failing to disclose the firm's involvement). Compare *In re Ruiz*, *infra*.

WWJGD?

- Ms. Shingle-Hanger does not file a statement under 11 U.S.C. § 329(a) and Rule 2016(b), Federal Rules of Bankruptcy Procedure, to disclose the pre-petition agreement and the $500 payment.

- Does Ms. Shingle-Hanger's failure to disclose the existence of the pre-petition agreement and compensation present an ethical problem?

COMPENSATION DISCLOSURES REQUIRED!

- The starting point of this discussion is § 329(a) of the Bankruptcy Code: "Any attorney representing a debtor in a case . . . or in connection with such a case, whether or not such attorney applies for compensation . . . , shall file . . . a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case . . . , and the source of such compensation."

- Rule 2016(b) implements § 329 as follows, in relevant part: "Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code . . . ."

- An appropriate sanction for noncompliance with § 329(a) is disgorgement of all or part of the compensation. "Many courts, perhaps the majority, punish defective disclosure by denying all compensation." *In re Gage*, 394 B.R. 184, 191 (Bankr. N.D. Ill. 2008). *But see In re Howard Avenue Station*, 568 B.R. 146 (Bankr. M.D. Fla. 2017) (court takes a case-by-case approach, considering all relevant factors, many of which are listed in the opinion).

DUE DILIGENCE

TRUE OR FALSE:

Having a paralegal prepare the bankruptcy schedules and statements of financial affairs with your client and you signing off afterwards without meeting with the client is acceptable practice.

THE STANDARD OF CARE IN PREPARING BANKRUPTCY SCHEDULES AND STATEMENTS OF FINANCIAL AFFAIRS DOES NOT INCLUDE ANY OF THE FOLLOWING: TRUE OR FALSE:

a. Ordering and reviewing more than one credit report;

b. Searching the public records in the county/counties and states where the debtor lives or has lived in recent years;

c. Searching the Florida Judgment Lien Registry - https://dos.myflorida.com/sunbiz/search/

d. Searching the Florida Secured Transaction Registry - https://www.floridaucc.com/uccweb/

e. Having the debtor carefully review the bankruptcy schedules and statements of financial affairs and confirm in separate writing to you that they have reviewed them, are true and correct, and will let you know if there are subsequent errors or omissions discovered.

TRUE OR FALSE:

Attorneys filing documents in Bankruptcy Cases can be held liable for mistaken information contained in those documents.

ZEALOUS ADVOCACY

WHAT IS "ZEALOUS ADVOCACY" ?

- **Zealous Advocacy**: has been defined by some as "doing everything reasonable, within a lawyer's means, to help a client achieve the goals set forth at the outset of the representation."
- Although the term "zealous advocate" is not specifically defined in the ABA Model Rules of Professional Conduct ("Model Rules"), it is referenced throughout the Model Rules.

ZEALOUS ADVOCACY UNDER THE MODEL RULES

- **Preamble** "[a]s advocate, a lawyer ***zealously asserts the client's position*** under the rules of the adversary system." (emphasis added).
- **Rule 1.3, Comment 1**: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and ***with zeal in advocacy*** upon the client's behalf. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." (emphasis added).

ZEALOUS ADVOCACY HAS LIMITS

- **Despite emphasizing "zealous advocacy," the Model Rules also impose limitations on a lawyer's behavior.**
  - **Model Rule 3.1, Comment 1**: "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed."
  - **Model Rule 3.5 (d):** "A lawyer shall not . . engage in conduct intended to disrupt a tribunal."

ZEALOUS ADVOCACY ≠ ABUSIVE OR DISPRUPTIVE CONDUCT

- **Model Rule 3.5, Comment 4**:
  - "The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."
- **Model Rule 3.5, Comment 5:**
  - **"**The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."

ZEALOUS ADVOCACY ≠ BEING DISRESPECTFUL

- ***Matter of Delio*, 290 A.D.2d 61, 731 N.Y.S.2d 171 (N.Y. App. Div., 2001):**
  - After arriving late to a hearing and learning that his case was dismissed, the Court permitted a lawyer to approach the bench. The lawyer engaged in an exchange with the Court where he said:
    - "This is [inaudible] other than your own self interest— . . . You're so pompous on the bench. It's ridiculous. You should remember what your jobs are. . . . I don't have to respect you if you're not— . . .You're wrong."

ZEALOUS ADVOCACY ≠ DISRUPTING COURT PROCEEDINGS

- ***The Florida Bar v. Ratiner*, 238 So. 3d 117 (Fla. 2018).**
  - During a post-trial hearing, the attorney was overheard saying "lie, lie, lie" while opposing counsel was questioning a witness; repeatedly kicked the leg of opposing counsel's table; and threw documents on opposing counsel's table during cross-examination.
  - During closing arguments, the attorney refused to limit his closing argument to time limits set by the Court, and told the Judge he would "take whatever time he needed."
  - During the entire trial, the attorney was "rude, overly aggressive, unprofessional and at times appeared to try to intimidate the witness"

What should the Supreme Court do?

ZEALOUS ADVOCACY ≠ MOCKING OPPOSING COUNSEL

- ***Lee v. American Eagle Airlines, Inc.*, 93 F.Supp.2d 1322 (S.D. Fla., 2000):**
- When awarding prevailing plaintiff attorney's fees under the statute, the Court reduced the fee awarded under the statute by $358,423.20 (more than half) because of the conduct of plaintiff's counsel, which included:

  Entering the Courtroom at the start of trial and announcing loudly "Let's kick some ass."

  Calling local counsel for the Defendant a "Second Rate Loser."

  Saying each day as court began, "Let the pounding begin."

  Asking, in front of defense counsel's client, "How are you going to feel when I take all of your client's money?"

  When walking out of the courtroom, counsel would exclaim "Yuppies out of the way."

TWO WRONGS ≠ RIGHT

- Two lawyers in Florida – Nicholas Mooney and Kurt Mitchell – were opposing counsel in several litigation cases.
- The attorneys engaged in a series of email exchanges that became increasingly hostile and unprofessional.
- In the emails, the attorneys commented about each other, their families, and their children – including a special needs child.
- The Florida Bar filed complaints against each of the attorneys.

The Florida Bar attached several emails between the attorneys, which included the following comments:

- From Mooney:
  - After an accusation that he couldn't handle the pressures of litigation, Mooney said he has "handled case loads in excess of 200 cases, many of which were more important/significant than these little Mag[nuson] Moss [warranty] claims that are handled by bottom feeding/scum sucking/loser lawyers like yourself."
- From Mitchell:
  - "I was actually on the internet trying to find out what type of retardism you have by checking your symptoms, e.g., closely spaced eyes, dull blank stare, bulbous head, lying and inability to tell fiction from reality, so I could donate money for research for a cure."
- From Mooney:
  - "If you need to find the indications of "retardism" you seek, I suggest you look into a mirror, then look at your wife – she has to be a retard to marry such a loser like you . . . then check your children (if they are even yours. … Better check the garbage man that comes by your trailer to make sure they don't look like him)."
- From Mitchell, after learning Mooney's son suffers from a birth defect:
  - "While I am sorry to hear about your disabled child; that sort that sort of thing is to be expected when a retard reproduces, it is a crap shoot and sometimes retards can product normal kids, sometimes they produce F***** up kids. Don't hate me, hate your genetics. However, I would look a the bright side, at least you know the kid is yours."
- From Mooney:
  - " . . . The fact that you are married means that there is truly someone for everyone, even a short/hairless jerk!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization !!!!"

ZEALOUS ADVOCACY ≠ MAKING A SCENE IN COURT, OR BEING ABUSIVE TO COURT STAFF

- ***The Florida Bar v. Wasserman*, 675 So.2d 103 (Fla. 1996):**
  - After an unfavorable ruling, the lawyer lost his temper, stood and shouted his criticism, waved his arms, challenged the Court to hold him in contempt and displayed his arms as if to be handcuffed stating his "contempt" for the court. The lawyer also banged on the table and generated such a display of anger that the bailiff who was present felt it necessary to call in a backup bailiff. Immediately thereafter, outside the hearing room, in the presence of both parties and opposing counsel, the lawyer stated that he would advise his client to disobey the court's ruling.
  - In another case, after getting an unfavorable response to a question asked over the telephone of a Judge through Judge's J.A., the lawyer said to J.A., "You little motherf-----; you and that judge, that motherf----- son of a b----." The J.A. was so upset by the incident that she had to leave the office early that day.

ZEALOUS ADVOCACY ≠ BEING VULGAR AND THREATENING OPPOSING COUNSEL

- ***Alan Baker, et. al. v. Allstate Insurance Company, et. al.*, Case No.: 2:19-cv-08024-ODW-JC, U.S. District Court, Central District of California**

Allstate insurance company sought an *ex parte* order dismissing the case, disqualifying plaintiff's counsel, entering a restraining order, cancelling depositions, and ordering sanctions as a result of counsel's "abusive and intolerable conduct that began with profanity-laced emails, escalated to discriminatory slurs, and culminated in repeated threats of physical violence against Allstate's witnesses, Allstate's attorneys, and their families."

Plaintiff's counsel sent dozens of abusive and threatening emails to Allstate's counsel, including ones that said:

WARNING: THE NEXT SLIDE IS NOT PG-13!

"F--k you crooks. Eat a bowl of d--ks."

"I'm going to let the long d--k of the law f--k Allstate for all of us."

"Peter when you are done felating your copy boy tell Allstate the demand is now 305 million."

"I want my clients' money gay boys."

"Hey s--t for brains Allstate owes my clients a lot of money. It's due yesterday. Pay up f--ktard or you will be lucky to work as a notary public in El Cajon."

"Tell Allstate I am going to water board each one of their trolls that show up for depo without any mercy whatsoever." (Klee Decl., Ex. 1, p. 18)

"Don't make me come down there and beat out of you you f--king thief."

"Well karma is a b---h mother f--ker. You are going to learn that in spades. I know where you live pete."

ZEALOUS ADVOCACY ≠ USING VULGARITY "FOR EFFECT" OR "PUFFERY"

- Plaintiff's filed a response to the Motion which argued, among other things, that he "sought to employ a confidential negotiating tactic by employing harsh language and provocative insults against counsel for ALLSTATE, out of an interest in trying to resolve this case only. The undersigned recognizes that perhaps some of the language "crossed the line" of civility and was offensive and inappropriate. ***With that said, the language used was "for effect," similar to bluster or "puffery" and was not intended to actually be considered personal insults***. At no time did the undersigned threaten or intend to threaten defense counsel, their co- workers or families with harm. The undersigned apologized to defense counsel and the Court and represents and warrants that such language will not be used by the undersigned again in this matter." (emphasis added).

What should the Judge do?

THE RULES ALSO APPLY TO JUDGES

- *Inquiry Concerning a Judge, No. 14-255 Re: John C. Murphy*, Supreme Court of Florida
  - Judge John C. Murphy had a verbal altercation with an Assistant Public Defender, after the Public Defender refused to waive speedy trial for his client.
  - The Judge told the Public Defender: "You know if I had a rock, I would throw it at your [sic] right now. Stop pissing me off. Just sit down."
  - When the Public Defender refused to sit down, asserting his right to stand and represent his clients, the Judge responded, shouting: "I said sit down. If you want to fight, let's go out back and I'll just beat your ass." The two men left the courtroom and met in the hall.
  - The Judge then left the bench, met the Public Defender in the hall, and the two engaged in a physical altercation.

What should the Supreme Court do to this Judge?

GOLDEN RULE

DO UNTO OTHERS AS YOU HAVE THEM DO TO YOU.

THE DO'S AND DON'TS OF DISCOVERY
MAINTAINING CIVILITY

THE RULES

- **Rule 4-3.4(d), Florida Rules of Professional Conduct:** "A lawyer must not … in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party."
- **Fed. R. Civ. P. 26(b)(1): General scope of discovery**
  - Relevant to any party's claim or defense
  - Proportional to the needs of the case
- **Fed. R. Civ. P. 26(c)(1): Protective orders**
  - For good cause, court may issue order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"

THE RULES (CONT'D)

- **Fed. R. Civ. P. 26(g): Signatures and certifications of discovery responses**
  - By signing discovery requests, responses, and objections, an attorney certifies that to the best of his/her knowledge, information, and belief formed after a reasonable inquiry:
    - Disclosures are complete and correct
    - Requests, responses, or objections are consistent with rules and nonfrivolous
    - Not interposed for improper purpose
    - Not unreasonable or unduly burdensome

THE RULES (CONT'D)

- **Fed. R. Civ. P. 37: Sanctions for discovery failures**
  - Compulsion of discovery responses
  - Court **must** impose reasonable expenses incurred unless…
  - Additional, more severe sanctions for failure to comply with court order or failure to attend deposition or respond to interrogatories or requests for production

THE RULES (CONT'D)

- **28 U.S.C. § 1927:** Gives court authority to impose costs, expenses, and fees incurred as a result of attorney conduct that "multiplies the proceedings … unreasonably and vexatiously"
- Court's inherent authority to sanction misconduct regardless of whether procedural rules apply
  - See *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991)

GUIDANCE

- **Professionalism Expectations**
  - Guidance from Florida Bar Standing Committee on Professionalism
- **Guidelines for Professional Conduct**
  - Detailed guidance from Trial Lawyers Section of the Florida Bar regarding depositions, document demands, interrogatories
- **Florida Handbook on Civil Discovery Practice (2019 ed.)**
- **Middle District Discovery Handbook (2015 ed.)**

- **Is a lawyer's duty to the Court or the client paramount?**
  - The Court. *See Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536 (11th Cir. 1993)

DEPOSITIONS:
PROPER AND IMPROPER CONDUCT

- **Instructing witness not to answer**
  - When is it appropriate?
    - (1) To preserve a privilege
    - (2) To enforce a court-ordered limitation
    - (3) To present a motion to terminate or limit a deposition under Rule 30(d)(3)

DEPOSITIONS:
PROPER AND IMPROPER CONDUCT (CONT'D)

- **When it is appropriate to terminate a deposition early?**
  - When conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. *See* Fed. R. Civ. P. 30(d)(3)(A)

- **When is it appropriate to contact the Court?**
  - "In unusual circumstances with material and adverse consequences." *See* Middle District Discovery Handbook § II.B.5.
    - BUT this procedure "should be employed rarely (and only after counsel have made every effort to resolve the dispute)." See id.
  - *See also* M.D. Fla. Bankr. Local R. 7001-1(j)(4)

IMPROPER OBJECTIONS TO DEPOSITIONS (COACHING)

- Should you tell a witness to answer "if you know" or "if you remember" or to not "guess"?
- Should you state that you don't understand a question asked by opposing counsel?
- *See In re Neurontin Antitrust Litig.*, No. 02-1390(FSH), 2011 WL 253434, at *12 (D.N.J. Jan. 24, 2011) ("[O]bjections should be concise, non-argumentative, and non-suggestive, and hence … counsel should not (1) make speaking, coaching or suggestive objections; (2) coach or change the witness's own words to form a legally convenient record; (3) frustrate or impede the fair examination of a deponent during the deposition by, for example, making constant objections and unnecessary remarks; (4) make speaking objections such as 'if you remember,' 'if you know,' 'don't guess,' 'you've answered the question,' and 'do you understand the question'; or (5) state that counsel does not understand the question.")

DOCUMENT REQUESTS:
PROPER AND IMPROPER CONDUCT

- **When are discovery requests overbroad?**
  - "Boilerplate" definitions, instructions and requests
  - *See Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292 (11th Cir. 2011)
- **Is it sufficient to object on the ground that a request is "overly broad, unduly burdensome, and outside the scope of permissible discovery"?**
  - No. *See Fischer v. Forrest*, Nos. 14 Civ. 1304 (PAE) (AJP), 14 Civ. 1307 (PAE) (AJP), 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017); *Polycarpe v. Seterus, Inc.*, No. 6:16–cv–1606–Orl–37TBS, 2017 WL 2257571 (M.D. Fla. May 23, 2017)
  - *See* Fed. R. Civ. P. 34(b)(2)(B) and (C)

DOCUMENT REQUESTS (CONT.)

Do you sufficiently preserve objections by stating that responses are provided "subject to and without waiving" previously stated objections?

No. *See Polycarpe*

RESPONSIBILITY FOR CLIENT'S DISCOVERY MISCONDUCT – RULE 26(G)

- **Is an attorney responsible for a client's discovery abuses, even if not actively participating in it?**
  - Yes. *See* Rule 26(g)
  - *See DeCastro v. Kavadia*, 309 F.R.D. 167 (S.D.N.Y. 2015), and *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997), for examples of facilitating a client's discovery abuses
- **Does producing requested discovery cure prior discovery abuses?**
  - Not necessarily. *See King v. Dillon Transp., Inc.*, No. CV411-028, 2012 WL 592191 (S.D. Ga. 2012)

FEE SHIFTING:
WHEN IS IT APPROPRIATE?

- **How many of you have both asked for and pushed the Court to impose fee-shifting as a discovery sanction?**
- **Rule 37(a)(5)(A) states a court "must" require the party or deponent whose conduct necessitated a motion to pay the reasonable expenses incurred by the other party**
  - BUT a court "must not" impose such sanctions if:
    - The movant did not confer in good faith first
    - The opposing party's response was substantially justified
    - "Other circumstances make an award of expenses unjust"
- **How many of you have seen judges actually impose fee-shifting as a sanction?**
- **Can counsel go too far in pushing for fee-shifting?**

"The highest reward that can come to a lawyer is the esteem of his professional brethren. That esteem is won in unique conditions and proceeds from an impartial judgment of professional rivals. It cannot be purchased. It cannot be artificially created. It cannot be gained by artifice or contrivance to attract public attention. It is not measured by pecuniary gains. It is an esteem which is born in sharp contests and thrives despite conflicting interests. It is an esteem commanded solely by integrity of character and by brains and skill in the honorable performance of professional duty…In a world of imperfect humans, the faults of human clay are always manifest. The special temptations and tests of lawyers are obvious enough. But, considering trial and error, success and defeat, the bar slowly makes its estimate and . . . the careers which it approves are at once its most precious heritage and an important safeguard of the interests of society " Chief Justice Charles Evans Hughes

WWJGD (What Would Judge Glenn Do)?.....

Wednesday, January 15, 2020
3 p.m. – 4:15 p.m.

Hon. Catherine Peek McEwen, Moderator
Jacob A. Brown
Betsy C. Cox
Professor Roberta Kemp Flowers
Jerry M. Markowitz

I. Introductions

II. Remembering Hon. Paul M. Glenn

III. Establishment of the Attorney-Client Relationship, Conflict of Interest/Who do you represent? Individual v. corporations, multiple corporation representation and intercompany transfer issues. Ghostwriting.

IV. Due diligence requirements. Prerequisites for bankruptcy schedules, statement of financial affairs and other court filings. Public record review.

V. Zealous Advocacy

VI. Discovery Disputes

VII. The Golden Rule – How should lawyers communicate with each other? Tips for email protocol and other attorney to attorney communications.

REMARKS ON PROFESSIONALISM

Paul M. Glenn
Chief Bankruptcy Judge

Jacksonville Bankruptcy Bar Association
January 24, 2007

The Tragedy of Othello, The Moor of Venice[1]
Act III, Scene iii

Iago: Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash—'tis something, nothing,
'Twas mine, 'tis his, and has been slave to thousands—
but he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.

Reclaiming a Noble Profession[2]

A nation's laws are an expression of its people's highest ideals.[3] At times, regrettably, the conduct of our nation's lawyers seems to be an expression of the lowest. Many lawyers appear to have forgotten the integrity and civility that once distinguished our profession. One study reports that 82% of attorneys surveyed think the profession is growing increasingly uncivil.[4] Another tells us that more than 50% of lawyers describe their colleagues with the word "obnoxious."[5] As one Judge characterized the situation:

> The legal profession is no longer a "profession." Lawyers are now men. They use cut-throat tactics and are no longer

[1] William Shakespeare.
[2] The American Inns of Court: Reclaiming a Noble Profession, Matthew Bender & Co., Inc., 1997.
[3] George William Friedrich Hegel, Philosophy of Right (Oxford: Clarendon Press 1967) 259276.
[4] Rocco Commarere, "Lawyers in Survey Agree: Colleagues Are More Discourteous," New Jersey Lawyer (10 June 1996): 22.
[5] Katherine Schwett, "Law Too Tension-Filled, Survey of Lawyers Shows," Chicago Daily Law Bulletin 24 (21 May 1990): 1.

> professional. The almighty dollar seems to be the only thing that counts.[6]

The public apparently shares this view of our profession. The number of people who have little or no respect for lawyers nearly doubled in the 1990s.

This failing public image of the legal profession is attributable, in part, to a decline in professionalism. Dean Roscoe Pound once said that a profession is a "group ... pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood." His statement recognizes that professionalism entails obligations: obligations toward clients, obligations toward other attorneys, obligations toward legal institutions, and obligations to the members of the public. All too often, lawyers today seem to believe that there is no room for those who believe that practicing law carries with it such responsibilities.[7]

> The all-too widespread belief is that all lawyers are expensive, evasive, manipulative, and arrogant. This belief is the very opposite of what lawyers must be as true professionals.[8]

I. What is Professionalism?

A. History[9]

Originally, the word "profession" meant a sacred vow given in a religious ceremony that indicated a "professional" was to undertake membership in a religious order.[10] Prospective clergy "professed" their intention to dedicate themselves to contemplation and not earthly pursuits of commerce or personal advancement. After the clergy, the legal profession evolved. This new profession borrowed a great deal from the religious tradition in the giving of vows, the swearing of oaths, and the dedication to something beyond just employment.

To this day, the continued practice of swearing an oath for a higher purpose has maintained the legal profession's commitment to make the legal system equally available to all...

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[6] Gordon Hunter, "In their Own Words," Texas Lawyer (3 April 1995): 29.
[7] *Id.*
[8] From "Law—A Profession or Just Another Job?" by LeRoy Costner, in *The Professional,* a publication of The Henry Latimer Center for Professionalism of The Florida Bar, Summer 2006, Volume VII, No. 4.
[9] *Id.*
[10] *The Oxford English Dictionary* 573 (2d ed. 2001).

Although the oath of attorney has changed since its inception, the spirit has remained the same. In Roman times, the oath that lawyers were required to take stated that a lawyer should "only speak that which he believed to be true."[11] In medieval England the different oaths centered around six traditional themes—litigation fairness, competence, loyalty, confidentiality, reasonable fees, and public service.[12] While the words of the oaths varied, even within the same jurisdiction, the spirit was universal. The same holds true today. While not every state's bar association uses the same words, the guiding spirit of the original oath remains—justice for all.

. . . [T]he Florida Oath is a modern version of one of the oldest uniform oaths given. In 1402, England sought to regulate attorneys and created a standard oath.[13] In that oath, all attorneys had to swear to God that they would not cause delay to the justice system for "lucre Gain or Malice."[14] The last line of the Florida Oath of Admissions harkens back to these very words uttered over six hundred years ago: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice."[15]

B. Earmarks of Professionalism[16]

1. Ethical conduct
2. Trustworthiness
3. Being prepared
4. Maintaining independence
5. Melding zealous advocacy with professional civility
6. Dealing with "time" responsibly and flexibly
7. Subordinating self-interest
8. Recognizing and repaying a debt to society

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[11] Carol Rice Andrews, *Standards of Conduct for Lawyers,* 57 SMU L. Rev. 1385, 1393 (2004)(citing Joseph Cox, *Legal Ethics,* 19 *The Weekly Law Bulletin of Ohio L.J.* 47, 49 (1888)).
[12] *Id.* at 1387.
[13] Id. at 1403 (citing Johathan Rose, *The Legal Profession in Medieval England: A History of Regulation,* 48 Syracuse L.Rev. 1, 135 (1998)).
[14] *Id.* at 1404 (citing Josiah Henry Benton, *The Lawyer's Official Oath and Office* (1909)).
[15] Oath of Admission to The Florida Bar.
[16] From *The Professional,* Winter 2006, Volume VII, No. 3.

C. A hallmark of professionalism is civility to other lawyers. "What is imperatively needed is more emphasis on professional ethics, of manners and deportment in the courtroom and in the practice; in short, the necessity for civility in what is inherently a contentious human enterprise."[17]

II. The Jacksonville Bankruptcy Bar Association

A. A professional group

B. Limited number; specialized practice; work together regularly

C. Active members and good leadership

D. Friendships

i. Among members of the bar

ii. With judges

III. Putting Professionalism into Practice—Overview

A. Obtaining Clients

B. Representing Clients

C. Professionalism in Court

D. Public Service

IV. Obtaining Clients

A. Current and projected statistics of bankruptcy filings

1. Statistics

2. Underlying factors still present

B. Public perceptions regarding bankruptcy

[17] Warren E. Burger, "The Legal Profession is a Monopoly," Address before the American Inns of Court, 1 June 1990.

1. Does bankruptcy still exist?

2. Is there a stigma?

C. Public interest information

D. Advertising

1. Bates v. Arizona, 433 U.S. 350, 379 (1977): "[W]e are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys."

2. In Florida, extensive Rules Regulating The Florida Bar with regard to advertising are applicable. Pursuant to new ad rules (effective January 1, 2007), radio and TV ads that contain more than basic "safe harbor" information (see Rule 4-7.2(b)(1)) must be approved by the Bar prior to broadcast; the ads must be submitted at least 15 days before their first airing. The Florida Bar Standing Committee on Advertising has produced a publication on advertising by lawyers: Handbook on Lawyer Advertising and Solicitation. The Florida Bar Standing Committee on Advertising. Sixth Edition: March 2000 (Revised May 2004). This may be downloaded from the floridabar.org website.

a. Rule 4-7.1 General

4-7.1(a) Permissible Forms of Advertising. Subject to all the requirements set forth in this subchapter 4-7, including the filing requirements of rule 4-7.7, a lawyer may advertise services through public media, including but not limited to: print media, such as a telephone directory, legal directory, newspaper or other periodical; outdoor advertising, such as billboards and other signs; radio, television, and computer-accessed communications; recorded messages the public may access by dialing a telephone number; and written communication in accordance with rule 4-7.4.

b. Rule 4-7.2 Communications Concerning a Lawyer's Services

c. Rule 4-7.3 Advertisements in the Public Print Media

d. Rule 4-7.4 Direct Contact with Prospective Clients

e. Rule 4-7.5 Advertisements in the Electronic Media Other Than Computer-Accessed Communications

f. Rule 4-7.6 Computer-Accessed Communications

g. Rule 4-7.7 Evaluation of Advertisements

h. Rule 4-7.8 Exemptions From the Filing and Review Requirement

i. Rule 4-7.9 Firm Names and Letterhead

j. Rule 4-7.10 Lawyer Referral Services

3. 1-800-PIT-BULL

> . . . From the perspective of a prospective client unfamiliar with the legal system and in need of counsel, a lawyer's character and personality traits are indistinguishable from the quality of the services that the lawyer provides. A courteous lawyer can be expected to be well mannered in court, a hard-working lawyer well prepared, and a "pit-bull" lawyer vicious to the opposition.
>
> . . . Indeed, permitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice. Prohibiting advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system. Were we to approve the referee's finding, images of sharks, wolves, crocodiles, and piranhas could follow. . . .

The Florida Bar v. Pape, The Florida Bar v. Chandler, 918 So. 2d 240, 244, 246-7 (Fla. 2005).

E. Requirements from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"):

> **§528. Requirements for relief agencies**
>
> (b)The debt relief agency must include in any advertisement the statement "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code" or a substantially similar statement.
>
> (c)Clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in the general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief.
>
> (d)These provisions also include any advertisement to the general public that the debt relief agency provides assistance with respect to credit defaults,

mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay consumer debt.

F. Referrals

1. From other clients

2. From other lawyers

V. Professionalism with Clients

A. Advising clients — ethical duties

1. Duty of competence. Florida Rules of Professional Conduct — Rule 4-1.1. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

2. Duty to communicate with client (requiring attorney to explain matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). Florida Rules of Professional Conduct, Rule 4-1.4.

3. Duty as adviser.

a. Florida Rules of Professional Conduct, Rule 4-2.1: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

b. The scope of a lawyer's advice must at times necessarily extend beyond narrow legal terms, and encompass practical, as well as moral and ethical, considerations. Comment to Florida Rules of Professional Conduct, Rule 4-2.1.

4. Duty of diligence. A lawyer shall act with reasonable diligence and promptness in representing a client. Florida Rules of Professional Conduct, Rule 4-1.3.

B. Attorneys as Debt Relief Agencies

1. §101. Definitions

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an *assisted person* [italics added] in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.

2. §526 - Restrictions on debt relief agencies

(a) A debt relief agency shall not

- fail to perform any service promised
- counsel or advise making an untrue or misleading statement in connection with any case filed under the Code
- misrepresent the services to be rendered
- misrepresent the benefits and risks of filing bankruptcy
- advise incurring more debt in contemplation of filing bankruptcy or to pay an attorney or bankruptcy petition preparer fee

(b) A waiver by any assisted person of his rights is unenforceable

3. §527 - Disclosures

(a) Must provide notice regarding types of bankruptcy chapters and services available from credit counseling agencies - §342(b) disclosures. [§527 (a)(1)]

(b) Clear and conspicuous written notice that [§527(a)(2)]

- all information given in the petition and case must be complete, accurate, and truthful
- all assets and liabilities must be completely and accurately disclosed
- replacement value of property subject to a lien or encumbrance must be stated after a reasonable inquiry
- current monthly income and allowable expenses and disposable income in a chapter 13 case are to be stated after reasonable inquiry
- all information provided may be subject to audit and failure to provide such information may result in dismissal of the case and/or criminal sanctions

4. §528 - Requirements for relief agencies

(a) A debt relief agency must within five days of first providing assistance but before the petition is filed provide a written contract that clearly and conspicuously explains the services to be provided and fees and charges for those services.

(b) The debt relief agency must include in any advertisement the statement "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."

(c) Clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in the general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief.

(d) These provisions also include any advertisement to the general public that the debt relief agency provides assistance with respect to credit defaults,

mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay consumer debt.

5. In re: Attorneys At Law And Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005). Judge Davis: "I believe that if Congress meant to ensnare attorneys in the thicket of §§526, 527 and 528, it would have used the term "attorney" and not "debt relief agency." *Cf* Olsen v. Gonzales, 350 B.R. 906 (D. Ore. 2006)("...it is the plain language of the Act that leads to the conclusion that attorneys are to be included in the definition of 'debt relief agency.")

6. Milavetz, Gallop & Milavetz P.A. v. United States, 2006 WL 3524399 (D. Minn). Chief Judge Rosenbaum of the District Court held that §§526(a)(4), 528(a)(4) and 528(b)(2) of the Bankruptcy Code are unconstitutional as applied to attorneys. "If lawyers are placed within the ambit of §101(4A) [definition of the term 'bankruptcy assistance'], the placement conflicts with §526(d)(2)(A). The conflict would exist because states would be deprived of their ability 'to determine and enforce qualifications for the practice of law.' If BAPCPA's debt relief agency sections apply to attorneys, it means Congress has taken upon itself the authority to determine the advice attorneys can give their clients and what attorney advertisements must say, thereby infringing on the state's traditional role of regulating attorneys." Id. at *7.

7. Hersh v. United States, 347 B.R. 19 (N.D. Tex. 2006). Provision in BAPCPA [§526(a)(4)] prohibiting attorneys from advising their clients to incur additional debt in contemplation of bankruptcy is unconstitutional. Also see Zelotes v. Martini, 352 B.R. 17 (D. Conn. 2006) and Milavetz, Gallop & Milavetz P.A. v. United States, 2006 WL 3524399 (D. Minn.).

C. Completeness of client disclosures. In addition to (and prior to) the requirements of BAPCPA, counsel is obligated ethically and as an officer of the court not to file schedules and other disclosure documents that he or she believes inaccurate.

1. See Florida Rules of Professional Conduct 4-1.2, 4-1.4, 4-3.3, 4-8.4

a. Rule 4-1.2 (d). Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

b. Rule 4-1.4(a) Informing Client of Status of Representation. A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules; (2) reasonably consult with the client about the means by which the

client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

c. Rule 4-3.3(a) False Evidence; Duty to Disclose. A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyers knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

d. Rule 4-8.4 Misconduct. A lawyer shall not ...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

2. Criminal statutes also apply.

a. 18 U.S.C. §152. Concealment of assets; false oaths and claims; bribery

b. 18 U.S.C. §157. Bankruptcy fraud

3. Crime-fraud exception to attorney-client privilege:

> There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.
>
> Clark v. United States, 289 U.S. 1 (1933).

D. Contracts, written notices and statements

E. Pre-bankruptcy planning

1. Duty to advise client about possible exemptions

a. Purpose of exemptions in bankruptcy — debtor's fresh start

b. Pre-bankruptcy planning not per se fraud

- The House and Senate Reports regarding the 1978 revision of the Bankruptcy Code provide:

As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law. H.R.Rep. No. 595, 95th Cong., 1st Sess. 361 (1977), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5963, 6317; S.Rep. No. 989, 95th Cong., 2d Sess. 76, *reprinted in* 1978 U.S.Code Cong. & Admin. News 5787, 5862. In re Smiley, 864 F.2d 562, 566 (7th Cir. 1989).

2. Duty to warn about possible consequences

a. Exemptions could be denied. *See, e.g.,* In re Mackey, 158 B.R. 509, 512 (Bankr. M.D. Fla. 1993); In re Schwarb, 150 B.R. 470, 473 (Bankr. M.D. Fla. 1992); In re Elliott, 79 B.R. 944, 946 (Bankr. M.D. Fla. 1987); In re Allen, 203 B.R. 786, 791 (Bankr. M.D. Fla. 1996). But see, In re Clements, 194 B.R. 923, 927 (Bankr. M.D. Fla. 1996); Crews v. First Colony Life Ins. Co. (In re Barker), 168 B.R. 773, 776 (Bankr. M.D. Fla. 1994).

- Florida statute provides that an exemption should be disallowed if it was made with the intent to defraud, but the statute only applies to statutory exemptions. Fla. Stat. § 222.29 states, "An exemption from attachment, garnishment, or legal process provided by this chapter is not effective if it results from a fraudulent transfer or conveyance as provided in chapter 726."

- Havoco of America, Ltd. v. Hill, 790 So. 2d 1018 (Fla. 2001). The Florida Supreme Court determined that the homestead exemption protects a homestead acquired by a debtor using nonexempt assets with the intent to hinder, delay, or defraud creditors, because such a transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors is not one of the three exceptions to the homestead exemption as listed in the Florida Constitution (FLA. CONST. art. X, §4(a)(1)). However, the transfer of such property into a statutorily exempt category of property is not protected by the constitution and such exemption should be disallowed.

b. Transfers could be avoided as fraudulent.

- 11 U.S.C. § 548. Fraudulent transfers and obligations.
- Crews v. First Colony Life Ins. Co. (In re Barker), 168 B.R. 773 (Bankr. M.D. Fla. 1994). In this adversary proceeding Judge Funk determined that the Debtors' transfer of stock sale proceeds into an exempt annuity five days prior to

filing their bankruptcy petition would be set aside as a fraudulent transfer and warranted denial of their discharge. "This type of cat-and-mouse pre-bankruptcy planning hinders and delays all creditors involved and is clearly prohibited by the Code." Id. at 780.

c. Discharge could be denied.

- 11 U.S.C. § 727(a)(2)(A).
- Secundy v. Caparelli (In re Caparelli), 131 B.R. 895 (Bankr. S.D. Fla. 1991). "This Court is attentive to the recognized right of a debtor to engage in pre-bankruptcy planning. The Court is also mindful that the mere transfer of assets from non-exempt to exempt status, of itself, is not per se fraudulent. [footnote omitted] However, several of the badges of fraud established by the court as evidence of a debtor's fraudulent intent are evident in this case. The evidence indicates that the debtor engaged in a course of conduct whereby she transferred or encumbered non-exempt assets following the failure of the [debtor's] business." Id. at 898.

3. Malpractice concerns

"Cases involving prebankruptcy planning and conversion of nonexempt assets into exempt assets are fact-intensive and the outcomes sufficiently unpredictable [footnote omitted] that a debtor's attorney must also advise the debtor that there can be dire consequences to transferring property, even if the effect is to transfer property to oneself. Thus, although conversion of nonexempt property into exempt property is not per se fraudulent [footnote omitted], the very reason for filing a bankruptcy petition—discharge of debts—could be thwarted [footnote omitted]. If, in fact, the debtor is unaware of all the consequences, attorneys could be exposing themselves to malpractice claims."

1 Collier on Bankruptcy ¶ 8.06[1][a] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. Rev.).

F. Disinterestedness

1. Attorney as Creditor

a. In re Leypoldt, 1995 WL 562183 (Bankr. D. Idaho). Chapter 12 debtors granted attorney security interest in unencumbered collateral; Court held attorney was not per se disqualified due to an adverse interest, but court would not approve attorney's employment without specific provisions requiring the collateral to be converted into a cash retainer as soon as practicable.

b. Look at 12 factors in examining the circumstances of each case to determine if the attorney's security interest in the debtor's property is materially

adverse to either the estate or the creditors. In re Martin, 817 F.2d 175, 182 (1st Cir. 1987).

c. 11 U.S.C. §§327(a) and 101(14)(A),(E) are applicable. While the precise language of the statutes is not identical, many cases hold there is no real distinction in the required status [between concepts of disinterestedness and no materially adverse interest]. Leypoldt at *8, FN2, quoting In re Martin, 817 F.2d 175, 179 (1st Cir. 1987).

d. In re Murphy, 178 B.R. 13 (Bankr. S.D. Fla. 1995). Judge Friedman held that attorney who took security interest in debtor's exempt asset was a "disinterested person" and was not disqualified from representing debtor.

e. Candid disclosure of fee arrangement with security interest (such as attorney's disclosure in Leypoldt, supra) has been cited by courts as one of the factors in allowing attorney to proceed. See In re Automend, 85 B.R. 173 (Bankr. N.D. Ga. 1988) where Judge Murphy held that taking of security interest in property of debtor's estate to secure attorney fees was not the custom and practice in the district, and disclosures of the arrangement only by schedules and at the creditor's meeting were inadequate disclosures to the Court. Bankruptcy Rule 2014 requires such arrangement to be fully disclosed prior to appointment. Id. at 178.

f. Florida Rule of Professional Conduct 4-1.8 Conflict of Interest: Prohibited and Other Transactions:

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction;; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

2. Representation of Close Corporation and Principal/Sole Shareholder a. Florida

a. Rule of Professional Conduct 4-1.7 Conflict of Interest: General Rule

Representing Adverse Interests. (a) Except as provided in subdivision (b), a lawyer shall not represent 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. (b) Informed consent may allow such representation in some circumstances.

b. The bankruptcy standard may be more stringent. See Parker v. Frazier (In re Freedom Solar Center, Inc.), 776 F.2d 14 (1st Cir. 1985). The First Circuit Court of Appeals held that a corporation debtor's interests are directly adverse to the interests of the debtor's sole shareholder when the shareholder is potentially indebted to the estate of the debtor for preferential transfers.

c. For additional discussion of the disinterestedness standard of §327(a), see Benisatto, Alexander G. and Alyson M. Fiedler, "Note: The Disinterested Standard of Section 327(A): Applying an Equitable Solution for Potential Conflicts in Small Bankruptcies," 7 American Bankruptcy Institute Law Review 363, Spring, 1999.

3. Representing multiple interests. See T.E. Baynes, Jr., *Ethical Conflicts in Bankruptcy Too Complicated for ALI Restatement?,* 31 Bankruptcy Court Decisions 15 (November 28, 1997).

G. Use of paralegals

1. In re Pinkins, 213 B.R. 818, 821 (Bankr. E.D. Mich. 1997), Judge Rhodes found that the legal assistants at the law firm in question performed services that constituted the unauthorized practice of law, including:

- Explaining to prospective clients the difference between chapter 7 and chapter 13 filings.

- Advising clients of options other than bankruptcy filing to resolve their financial problems.

- Helping the client to determine whether to file chapter 7 or chapter 13.

In holding that the legal assistants were engaged in the unauthorized practice of law, Judge Rhodes summarily rejected the argument by the law firm that "the legal assistants employed by the [law firm] were very well trained, and that the legal services, although not provided by an attorney, are of the highest quality." The court went on to state that "This argument misses the point. Legal assistants are not authorized to practice law." Id. at 821.

2. Also see In re Bass, 227 B.R. 103, 108 (Bankr. E.D. Mich. 1998), another case decided by Judge Rhodes involving the same law firm as above. Judge Rhodes found that "it is ...necessary for an attorney to meet with the client at the initial consultation, before delegating matters to nonlawyer staff members. It is not sufficient for the attorney to simply meet with the client at the signing appointment."

3. In re Hessinger & Associates, 192 B.R. 211, 223 (N.D. Cal. 1996). Chapter 7 case in which bankruptcy court found inadequate supervision of non-attorney employees of a law firm, violating the duty of competent representation. The District Court concluded:

> This failure of supervision also created a situation in which paralegals were making final decisions on how important legal aspects of individual bankruptcy filings, such as the claiming of exemptions, should be handled, and this constituted the unauthorized practice of law by those paralegals.
>
> As a final point on this issue, the court notes that a persistent theme in appellant's position on the role of paralegals in its practice is the argument that "everybody does it;" that is, all large consumer bankruptcy firms rely on paralegals to perform a large amount of the work required for filing a bankruptcy petition, and in all such firms the paralegals do so with only minimal attorney supervision. This may well be true; it may also be true that, given sufficient training, paralegals are fully capable of competently handling most aspects of a consumer bankruptcy case. The court however, is not in a position to decline to enforce the Rules of Professional Conduct merely because application of those rules results in attorneys being required to perform work which could be performed less expensively and more efficiently by non-lawyers. Nor is the court in a position to condone an unethical practice merely because most consumer bankruptcy firms are engaging in it.

H. Attorney participation in the case

1. The question of attendance of an attorney at the §341 meeting with his client generally comes up with regard to Chapter 7 cases. Applicable case law includes:

- A line of cases by Chief Judge Altenberger, including In re Bancroft, 204 B.R. 548 (Bankr. C.D. Ill. 1997), In re Stegemann, 206 B.R. 176 (Bankr. C.D. Ill. 1997), and In re Cox, 1999 WL 33581938 (Bankr. C.D. Ill.).

a. Bancroft, 204 B.R. at 551 — "It would follow that a professional, practicing bankruptcy law, cannot apply a high level of knowledge and skills unless he has some contact, and first meets, with the client to determine the client's needs and explains what action, if any, is required and its effects...Nor can an attorney apply his professional knowledge and skills without attending the first meeting of creditors..."

b. Cox 1999 WL 33581938 at *1 — "It may be mere coincidence that this Court is having numerous cases on this issue, or it may be that there is a developing feeling among attorneys that there is no need to attend the first meetings of creditors. In the future, should this trend continue and this Court come to the conclusion that it is by design, sanctions will be increased to a full forfeiture of fees."

- In re Castorena, 270 B.R. 504 (Bankr. D. Idaho 2001). Extensive opinion by Judge Myers analyzing issues involved in the case of an attorney who didn't sign prepared petition, allowing debtors to proceed pro se, for a "nominal fee of $250." In discussing the "core obligations" of a Chapter 7 representation, the Court stated:

> The attempt of Counsel to validate a standard or routine process of sending clients into bankruptcy court "unrepresented" as *pro se* debtors is unacceptable and rejected.
>
> Furthermore, for clarity, when accepting an engagement to represent a debtor in relation to a bankruptcy proceeding, an attorney must be prepared to assist that debtor through the normal, ordinary and fundamental aspects of the process. These include the proper filing of all required schedules, statements and disclosures; preparation and filing of necessary amendments to the same; attendance at the §341 meeting ....
>
> Id. at 530.

- In re Johnson, 291 B.R. 462 (Bankr. D. Minn. 2003). Local rule which provides in part "original attorney shall represent the attorney's client in bringing and defending all matters or proceedings in the bankruptcy case other than adversary proceedings ..." interpreted by the bankruptcy court to include attendance by the attorney at the §341 meeting.

- Also see In re Egwim, 291 B.R. 559 (Bankr. N.D. Ga. 2003) in which Court held that the Rule 2016 disclosure statement in the debtor's case which attempted to limit representation in the debtor's case to specifically listed services, and which did not include representation in adversary proceedings was ineffectual.

- However, see In re Merriam, 250 B.R. 724, 739 (Bankr. D. Colo. 2000), in which Chief Judge Krieger stated that there is no justification for a rule mandating attendance by every attorney representing a debtor at every Section 341 meeting. She based her opinion, in part, on an administrative order by the federal district court for the District of Colorado adopting a state rule specifically allowing the unbundling of services and providing a means for counsel to limit representation in bankruptcy court.

2. For a discussion of ghost-writing, the unbundling of legal services and the unmet legal needs of the poor and middle-class members of our society, see Fisher-Brandveen, Fern and Rochelle Klempner, Unbundled Legal Services: Untying the Bundle in New York State, 29 Fordham Urban Law Journal, February, 2002.

I. Lawyers: Victims or Vultures[18]

Fifty-six percent (56%) of clients have an unfavorable impression of lawyers.

Individual lawyer-client relationships form the foundation of overall success in restoring credibility to the legal profession.

The issues of service that are most important to clients and that will most likely be the determinative factors in client satisfaction include availability, timeliness, communication, and care and concern.

The leading causes of malpractice losses as recognized by the professional liability fund of a western state are lack of substantive competency, lack of administrative competency, lack of competency in communication skills, misunderstandings concerning fees, and impairment caused by substance abuse and/or emotional distress. In the views of this insurer, lawyers "usually don't fail; in the law . . . they fail most often in communication with their clients, reaching agreement regarding their fees and managing their practice."

In the discipline arena, the most common complaints have very little to do with substantive matters.

J. The Ten Most Common Discipline Complaints[19]

1. My attorney won't return my phone calls.

2. Can you tell me if there have been any complaints against my attorney?

3. My attorney is doing . . . Is my case being handled properly?

4. I fired my attorney, and now the attorney won't give my file back. Can you get it for me?

[18] From "American Bar Association Leadership Forum: Summit on the Profession" The Professional Lawyer, February, 1994. (Although this source is somewhat dated, these complaints are constant.)

[19] *Id*.

5. My attorney's bill is too high. What can I do?

6. My attorney won't respond to my letters.

7. My case was settled, but I haven't received my share of the settlement. How long should it take?

8. What can the State Bar do to help me with my attorney?

9. My attorney abandoned my case. Now what do I do?

10. My attorney wants to settle; I don't. The attorney will withdraw if I don't settle. Is that legal?

VI. Professionalism with Lawyers

A. Advocacy or Incivility.

1. The Zealousness Trap:

> . . . As a result of the pressures of practice some never make the proper course correction and their careers are burdened by a false conflict between their duty to their client and duty to the justice system. I refer to the issues concerning 'zealous representation' and the use of that phrase as a free pass to unprofessional behavior, incivility and a jingoistic disregard for the dictates of judicial guidance."[20]

2. Effective Advocacy or Sanctionable Conduct:

> . . . Although incivility in and of itself is call for concern, what is most disconcerting here is the rationale [the attorney] gives for his behavior. [The attorney] asserts that his deplorable and wholly unprofessional conduct helps him recover more money for his clients. Unremorsefully and brazenly, [the attorney] contends that his egregious behavior serves him well in settlement negotiations and is therefore appropriate. . . .
>
> " . . . We ... hold that the bankruptcy court did not abuse its discretion by imposing a sanction of $25,000."
>
> In re First City Bancorporation of Texas, Inc., Greenfield, et al. v. First City Bancorporation of Texas Inc., 282 F.3d 864 (5th Cir. 2002).

[20] From *The Professional,* Summer 2006, Volume VI, No. 4.

3. Pit-bull or Professional:

". . . Pit bull dogs possess both the capacity for extraordinarily savage behavior and physical capabilities in excess of those possessed by many other breeds of dogs. Moreover, this capacity for uniquely vicious attacks is coupled with an unpredictable nature." Harn v. City of Overland Park, 244 Kan. 638, 772 P.2d 758, 768 (1989) quoted in Pape, 918 So.2d 245.

4. Proverbs to Remember:

"An offended brother is more unyielding than a fortified city,
and disputes are like the barred gates of a citadel."
Proverbs 18:19

"A soft answer turns away wrath,
but harsh words stir up anger."
Proverbs 15:1

B. Reliability—punctual, timely, responsive

C. Candor

1. A lawyer shall not make a false statement of material fact.

a. Florida Rule of Professional Conduct 4-4.1(a) Truthfulness in Statements to Others. In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person...

b. Comment — Misrepresentation. A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

c. Comment — Statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category...

2. Artful Deception?

- Ambiguous questions cannot produce perjurious answers
- Nonresponsive, misleading, and literally true testimony
- Requirement of literal falsity, distinction between lying and misleading

5. "Caveat Auditor"--distinction between lying and misleading--a listener is responsible for ascertaining that a statement is true before believing it.

3. Examples:

a. "Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements," Hastings Law Journal, November, 2001, Green, Stuart P.--View of Stuart Green, professor of law at Louisiana State University--"Although Clinton surely did make a handful of literally false statements under oath, it appears that most of his testimony consisted of statements that, though misleading, were literally true. As 'legalistic' as many of Clinton's responses undoubtedly were, the public seems to have understood — and accepted — the fact that they were neither lies nor perjurious."

b. Bronston v. United States, 409 U.S. 352 (1973). Facts: At a creditors meeting in a Chapter 11 case, Bronston was asked "Do you have any bank accounts in Swiss banks?" and he answered "No, sir." He was then asked, "Have you ever?" to which he answered "The Company had an account there for about six months, in Zurich." It was undisputed that Mr. Bronston's answers were literally truthful. Although at the time of questioning he did not have a Swiss bank account, he had a personal Swiss bank account for approximately five years. The government contended that the negative implication of his response to the second question was misleading and perjurious. Id. at 354-5.

In overturning the perjury conviction, the Supreme Court stated, "It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless ... any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." Id. at 362.

VII. Professionalism in Court

A. What is an "officer of the court"?

1. "An attorney is more than a mere agent or servant of his or her client; within the attorney's sphere, he or she is as independent as a judge, has duties and obligations to the court as well as to his or her client, and has powers entirely different from and superior to those of an ordinary agent. (footnote omitted) In a limited sense an attorney is a public officer, (footnote omitted) although an attorney is not generally considered a 'public officer,' civil officer,' or the like, as used in statutory or constitutional provisions. (footnote omitted) The attorney occupies what may be termed a 'quasi-judicial office' (footnote omitted) and is, in fact, an officer of the court. (footnote omitted)" 7 Am.Jur. 2d Attorneys at Law §3.

2. In re Bergeron, 220 Mass. 472, 476-7 (1915). The Massachusetts Supreme Court stated:

> ...On that point it becomes necessary to consider somewhat closely the duties of an attorney at law. He is in a sense an officer of the state. From early days he has been required to take and subscribe an 'oath of office' which forbids him from promoting and even from wittingly consenting to any false, groundless or unlawful suit, from doing or permitting to be done [by] falsehood in court, and which binds him to the highest fidelity to the courts as well as to his clients. The courts being a department of government, this is but another way of saying that his obligation to the public is no less significant than that to the client. He is held out by the commonwealth as one worthy of trust and confidence in matters pertaining to the law....Manifestly the practice of the law is not a craft, nor trade, nor commerce. It is a profession whose main purpose is to aid in the doing of justice according to law between the state and the individual, and between man and man. Its members are not and ought not to be hired servants of their clients. They are independent officers of the court, owing a duty as well to the public as to private interests.

3. Langen v. Borkowski, 206 N.W. 181, 190 (Wis. 1925). The Wisconsin Supreme Court stated:

> An attorney at law is an officer of the court. The nature of his obligations is both public and private. His public duty consists in his obligation to aid the administration of justice; his private duty, to faithfully, honestly, and conscientiously represent the interest of his client. In every case that comes to him in his professional capacity, he must determine wherein lies his obligations of the public and his obligations to his client, and to discharge this duty properly requires the exercise of a keen discrimination, and wherever the duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter.

B. Preparation

1. "Preparation is the be-all of good legal work. Everything else—felicity of expression, improvisational brilliance—is a satellite around the sun. Thorough preparation is that sun." Louis Nizer.

2. Preparation is readily apparent

C. Candor

1. Florida Rule of Professional Conduct 4-3.3 False Evidence; Duty to Disclose. A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyers knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

2. Representations of facts; proffers of testimony

3. Arguments of law

i. Statements of the law and cases

ii. Acknowledge and address the difficult issues. Show the judge how and why he or she should decide for your client—address the difficult issues and explain how and why the issue should be decided

D. Pleadings, motions, and papers

1. Accuracy and candor in papers

2. Accuracy in Orders

3. Federal Rule of Bankruptcy Procedure Rule 9011(b). Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

. . . an attorney is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, . . . (2) the claims, defenses, and other

> contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; (3) the allegations . . . have evidentiary support; and (4) the denials . . . are warranted . . . .
>
> 4. Rule 9011 does not require attorneys to sign lists, schedules, statements, or amendments. Fed. R. Bankr. P. 9011(a).
>
> 5. Rule 9011 does not apply to discovery that is subject to Rules 7026-7037. Fed. R. Bankr. P. 9011(d).
>
> *6. See* Bankruptcy Abuse Prevention and Consumer Protection Act, Section 319. SENSE OF CONGRESS REGARDING EXPANSION OF RULE 9011 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE. It is the sense of Congress that rule 9011 of the Federal Rules of Bankruptcy Procedure (11 U.S.C. App.) should be modified to include a requirement that all documents (including schedules), signed and unsigned, submitted to the court or to a trustee by debtors who represent themselves and debtors who are represented by attorneys be submitted only after the debtors or the debtors' attorneys have made to verify that the information contained in such documents is—(1) well grounded in fact; and (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

E. Opposing the pro se debtor.

> Many *pro se* debtors are not able to traverse the territory of the Bankruptcy Code without encountering some difficulty. It is apparent to the Court that the Debtor in this case falls in that category, based on some of the comments and questions he raised during the August 2, 2006, hearing
>
> . . . The United States Court of Appeals for the Eleventh Circuit instructs trial judges, such as the undersigned, to treat *pro se* litigants, such as the Debtor, with "special care" because they "occupy a position significantly different from that occupied by litigants represented by counsel.'" *Johnson v. Pullman, Inc.,* 845 F.2d 911, 914 (11th Cir. 1988), (quoting *Moore v. Florida,* 703 F.2d 516, 520 (11th Cir. 1983)). The Court reasoned that "[g]iven the unique status of *pro se* litigants in our court system," it would be inappropriate in *pro se* cases to automatically apply the rules the same way as "in cases where parties are represented by attorneys presumably schooled in established court procedures." *Id.* In consideration of this matter, the court is "[m]indful of the incessant command of the court's conscience that justice be done in light of *all* of the facts." *Id.* (emphasis in original) (quoting *Griffin v. Swim-Tech Corp.,* 722 F.2d 677, 680 (11th Cir. 1984)).

from In re Witchard, Order Reconsidering Order Granting Motion for Relief from the Automatic Stay, by Judge McEwen.

VIII. Public Service

A. "Lawyers, like all those who practice a profession, have obligations to their calling which exceed their obligations to [their clients]. . . . [I]t is precisely because our duties go beyond what the law demands that ours remains a noble profession." Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 310-11 (1989).

B. Pro bono

C. Low-fee panel

D. Community volunteer

E. Presentations at schools

F. Mentoring

G. Nobility, Alice Cary 1820-1871

True worth is in being, not seeming—
In doing, each day that goes by,
Some little good—not in dreaming
Of great things to do by and by.
For whatever men say in their blindness,
And spite of the fancies of youth,
There's nothing so kingly as kindness,
And nothing so royal as truth.

We get back our mete as we measure—
We cannot do wrong and feel right,
Nor can we give pain and gain pleasure,
For justice avenges each slight.

For good lieth not in pursuing,
Nor gaining of great nor of small,
But just in the doing, and doing
As we would be done by, is all.
. . .

IX. The Florida Bar has extensive information on ethics and professionalism on its website, floridabar.org under the heading of Professional Practice.

A. Supreme Court Commission on Professionalism

Mission Statement: To promote the fundamental ideals and values of the justice system within the legal system and to instill those ideals of character, competence, and commitment in all those persons serving therein.

B. The Florida Bar Standing Committee on Professionalism

C Henry Latimer Center for Professionalism, is a joint project of the Supreme Court and The Florida Bar

D. Ideals and Goals of Professionalism

1. Commitment to equal justice under law and the public good

2. Adherence to a fundamental sense of honor, integrity, and fair play

3. Honesty and candor

4. Fair and efficient administration of justice

5. Courtesy

6. Respect for the time and commitments of others

7. Independence of Judgment

E. Guidelines for Professional Conduct

1. Scheduling, continuances, and extensions of time

2. Service of papers

3. Written submissions to a court, including briefs, memoranda, affidavits and declarations

4. Communication with adversaries

5. Depositions

6. Document demands

7. Interrogatories

8. Motion practice

9. Dealing with non-party witnesses

10. Ex parte communications with the court and others

11. Settlement and alternative dispute resolution

12. Pre-trial conference

13. Trial conduct and courtroom decorum

F. *The Professional,* a periodic publication of the Henry Latimer Center for Professionalism of The Florida Bar, and can be accessed through floridabar.org.

G. Ethics opinions. At floridabar.org. There is a subject index, and hundreds of opinions.

H. Ethics hotline. 1-800-235-8619. Established in 1984 to help guide lawyers through the minefields of conflict dilemmas, confidentiality questions, communication concerns, trust accounting problems, and other ethics difficulties unique to the profession.

I. Creed of Professionalism

I revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each.

I will further my profession's devotion to public service and to the public good.

I will strictly adhere to the spirit as well as the letter of my profession's code of ethics, to the extent that the law permits and will at all times be guided by a fundamental sense of honor, integrity, and fair play.

I will not knowingly misstate, distort, or improperly exaggerate any fact or opinion and will not improperly permit my silence or inaction to mislead anyone.

I will conduct myself to assure the just, speedy and inexpensive determination of every action and resolution of every controversy.

I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy.

I will respect the time and commitments of others.

I will be diligent and punctual in communicating with others and in fulfilling commitments.

I will exercise independent judgment and will not be governed by a client's ill will or deceit.

My word is my bond.

J. Oath of Admission to The Florida Bar

I do solemnly swear:

I will support the Constitution of the United States and the Constitution of the State of Florida;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God.

X. Conclusion

A. Elements of professionalism

B. Reputation

1. Among lawyers, judges, and the public

2. "Good name in man and woman, dear my lord, is the immediate jewel of their souls.

No One Likes to Be Ghosted, Especially Judges

©By Catherine Peek McEwen
United States Bankruptcy Judge, Middle District of Florida

Ghostwriting and unbundling to enable a debtor client to receive fewer services and thus pay less than the going rate for full-service representation may be tempting — particularly during troughs in the economic cycle of the bankruptcy business. But beware, because what follows here may spook you. Ghostwriting and the resultant unbundling of a full-service package are rarely acceptable in bankruptcy courts sitting in Florida.

Unbundling

Generally speaking, limited scope representation (unbundling) with the client's informed consent is permitted. But the general rule yields to the more particular requirements of the Rules of Professional Conduct of the Rules Regulating the Florida Bar for attorneys in Florida. The Model Rules of Professional Conduct provide that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Model Rules of Prof'l Conduct R. 1.2(c). However, the Rules Regulating the Florida Bar, Rules of Professional Conduct differ in three ways, one being more broad and the others more restrictive: (i) the limitation may apply to the objectives of the representation as well as the scope, (ii) the client must agree in writing, and (iii) the limitation must comply with applicable law and rules. R. Regulating Fla. Bar 4-1.2(c).

Thus, Florida attorneys must consult a court's local rules to determine if those rules preclude so-called "unbundling" of legal services even if such practice is otherwise permissible. For example, Rule 2091-1 of the Local Rules of the United States Bankruptcy Court for the Middle District of Florida does not permit unbundling absent court approval if the attorney files the petition. The rule provides:

> 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.

Bankr. M.D. Fla. R. 2091-1. *Cf.* Bankr. N.D. Fla. R. 2090-1 D. (1); Bankr. S.D. Fla. R. 2090-1(E).

Query: What if the attorney doesn't technically *file* the petition? See *In re Ruiz*, 515 B.R. 362 (Bankr. M.D. Fla. 2014).

N.B.: Bankruptcy courts in the Middle District of Florida *may* authorize unbundling and permit an attorney to cease providing services post-petition when the pre-petition representation is on a pro bono basis. So, for example, if an attorney provides pre-petition services to an indigent client on a pro bono basis just to get the case started correctly, the Court would likely permit her withdrawal from the rest of the case.

Ghostwriting

Aside from running afoul of local rules prohibiting unbundling, the preparation of a petition and accompanying papers without disclosure of an attorney's involvement (ghostwriting) often violates an attorney's duty of candor to the court.

Just what may an attorney do without disclosing his involvement to the court? The answer depends on the nature of the work performed and the jurisdiction in which it is performed. As noted in *Torrens v. Hood (In re Hood)*, 727 F.3d 1360 (11th Cir. 2013), different views exist among circuit courts that have weighed in on ghostwriting. "Compare *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001) (per curiam) (stating that 'any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved'), and *Ellis v. Maine,* 448 F.2d 1325, 1328 (1st Cir. 1971) (requiring that '[i]f a brief is prepared in any substantial part by a member of the bar, it must be signed by him'), with *In re Liu,* 664 F.3d 367, 373, 381 n.5 (2d Cir. 2011) (per curiam) (concluding that ghostwriting 'largely non-substantive' petitions for administrative cases 'did not constitute misconduct and therefore [did] not warrant the imposition of discipline.')." *Hood,* 727 F.3d at 1364 n. 5. In *Hood,* the Eleventh Circuit joined the *Liu* camp, holding that the a law firm that assisted the debtor in completing a "fill-in the-blank" standard form document did not "draft," meaning write or compose, the document and thus did not commit fraud on the court by failing to disclose the firm's involvement. *Hood,* 727 F.3d at 1364-65.

But if the attorney's services go beyond a fill-in-the-blank form, then in Florida, the Rules Regulating the Florida Bar treat ghostwriting as incompatible with the admonitions that that "[a] lawyer shall not . . . make a false statement of fact or law to a tribunal," R. Regulating Fla. Bar 4-3.3(a)(1), and "shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* at 4-8.4(c). A lawyer who "assists a pro se litigant by drafting any document to be submitted to a court, [need not] sign the document" id. at 4-1.2(c) cmt, but

"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." *Id.* at 4-1.2(c).

A danger or possible unfairness of such a misimpression in federal court is that in some federal circuits, trial judges must give pro se litigants more leeway than those represented by counsel. For example, the United States Court of Appeals for the Eleventh Circuit instructs trial judges to treat pro se litigants with "special care" because they "'occupy a position significantly different from that occupied by litigants represented by counsel.'" *Johnson v. Pullman, Inc.*, 845 F.2d 911, 914 (11th Cir. 1988) (quoting *Moore v. Florida*, 703 F.2d 516, 520 (11th Cir. 1983)). The court in *Johnson* reasoned that "[g]iven the unique status of pro se litigants in our court system," it would be inappropriate in pro se cases to automatically apply the rules the same way as "in cases where parties are represented by attorneys presumably schooled in established court procedures." *Id.* Hence, an ostensibly pro se party who has been assisted by unidentified counsel might gain an unwarranted advantage in the form of leniency if the ghostwriting remains undisclosed.

However, as indicated above, in federal courts in Florida, merely filling out standardized forms does not constitute ghostwriting. According to the Eleventh Circuit, that type of service is technically not "drafting" within the meaning of the comment to Rule 4-1.2(c). *Hood*, 727 F.3d at 1364. In *Hood*, the law firm's secretary completed a "standard fill-in-the-blank Chapter 13 petition based on Hood's verbal responses." *Id.*

Query: Would the Eleventh Circuit, or should it, have a different view if a lawyer, and not a secretary, filled out the form after consultation with the client? (Hint: "Who, within the firm, filled out the petition is a distinction without a difference." *Hood*, 727 F.3d at 1365.) Would the Eleventh Circuit, or should it, have a different view if a lawyer filled out schedules and the SOFA, and not just the petition, after consultation with the client? *See Ruiz*, *infra*.

Straight & Narrow

How Much Diligence Is Due?

Defining an Attorney's Duty to Perform a Pre-Petition Inquiry

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With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), it is more important than ever for us, as debtors' attorneys, to acknowledge the duties that we owe to our clients before filing a petition for bankruptcy relief. An attorney's duties of full disclosure and candor to the court are essential to maintaining the integrity of the bankruptcy system. Moreover, with the addition of 11 U.S.C. § 526(a)(2) (along with other pre-existing Bankruptcy Code provisions), a debtor's attorney who fails to disclose information on a petition or pleading risks civil penalties, attorneys' fees and costs, attorney disciplinary measures[1] or even criminal charges.[2]

The Bankruptcy Code has always emphasized an attorney's duty to truthfully disclose all known assets, liabilities and financial affairs in the debtor's schedules and pleadings. At least as early as the Bankruptcy Reform Act of 1978,[3] a debtor's attorney who signed a petition or other pleading certified that the attorney performed a reasonable investigation into the financial affairs of his or her client to ensure that the pleading was well grounded in fact.[4]

However, BAPCPA extended this duty through the enactment of 11 U.S.C. § 526(a)(2) to apply to any person who qualifies as a "debt relief agency,"[5] which aims to prevent abusive practices by bankruptcy professionals, as well as to ensure that all of a debtor's financial information is taken into account in administering his or her estate.[6] Although most debtors' attorneys make it a habit to review online court records, official records, property appraiser's reports and other available information, provisions like 11 U.S.C. §§ 526(a)(2) and 707(b)(4)(D), as well as Federal Rule of Bankruptcy Procedure 9011, may require additional probing prior to filing a bankruptcy petition.

The "Reasonable Inquiry" Standard under 11 U.S.C. § 526(a)(2)

Section 526(a)(2) of the Bankruptcy Code provides the following:

> A debt relief agency shall not ... make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading.

The requirement that an attorney exercise reasonable care in determining the accuracy of the information contained in a debtor's petition and schedules is often referred to as the "reasonable inquiry" standard. Section 526(a)(2) makes the attorney or debt-relief agency liable to the client for erroneously omitting critical information without investigating the truth or falsity of the alleged facts. An attorney who fails to perform a reasonable inquiry can be subject to disgorgement of fees to the debtor and civil penalties, and can be required to pay the attorneys' fees and costs of either the debtor, the state or U.S. Trustee.[7]

In re Gutierrez: Application of a Traditional Negligence Standard

Since 2005, several courts have explored the scope of a debt-relief agency's duty to perform a reasonable inquiry under § 526. In *In re Gutierrez*, a debtor sought the full return of all fees paid to his attorney after alleging that the attorney failed to exercise reasonable care before filing his petition.[8] The debtor first met with the attorney on March 13, 2006. The attorney prepared the debtor's petition, schedules and statements, which disclosed a home owned by the debtor. After their first meeting, but before filing the petition, the debtor quit-claimed his interest in the home to his nonfiling spouse and recorded the deed. The debtor met with the attorney to file the petition almost two months after their first meeting, but the attorney did not ask whether any information had changed or become inaccurate since their last meeting, so the transfer was not disclosed.

The U.S. Bankruptcy Court for the Northern District of California held that the attorney did not violate 11 U.S.C. § 526(a)(2) by failing to ask whether the debtor's circumstances had changed prior to the filing.[9] The court applied a negligence standard, reasoning that the debtor would not have

1 Most states' rules regulating attorney conduct require an attorney to be candid with the court. *See, e.g.*, Model Rules of Prof'l. Conduct R. 3.3.
2 *See* 18 U.S.C. §§ 151-158.
3 S. Rep. No. 95-989 (1978).
4 *See, e.g.*, 11 U.S.C. § 707(b)(4)(C).
5 A "debt relief agency" includes any person who provides bankruptcy assistance to a consumer debtor for a fee, which generally includes attorneys. For a more complete discussion on whether attorneys are considered "debt relief agencies," *see Milavetz, Gallop & Milavetz PC v. U.S.*, 559 U.S. 229, 235-39 (2010).
6 *Id.* at 236 n.3.
7 11 U.S.C. § 526(c).
8 *In re Gutierrez*, 356 B.R. 496, 500 (Bankr. N.D. Cal. 2006).

told the attorney about the transfer even if the attorney had asked.[10] The debtor had more than one opportunity to tell the attorney about the transfer and still failed to do so. As a result, the debtor was not able to prove causation, a crucial element to any negligence claim.[11]

Comparing § 526(a)(2) to Rule 9011

Other courts have compared the reasonable-inquiry standard under § 526(a)(2) to the one set forth in Bankruptcy Rule 9011.[12] Rule 9011 similarly requires an attorney to perform an "inquiry reasonable under the circumstances" before signing or filing any petition or pleading. A party that violates Rule 9011 is subject to a fairly broad range of sanctions, including monetary and non-monetary sanctions, as well as attorneys' fees and costs.[13]

For example, in *In re Garrard*, a slip opinion from the U.S. Bankruptcy Court for the Northern District of Alabama, the court applied the Rule 9011 definition of "reasonable inquiry" to a violation of 11 U.S.C. § 526(a)(2).[14] In this case, an attorney's duty to perform a reasonable inquiry requires five things:

> (1) to explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) to ask probing and pertinent questions designed to elicit [such disclosure]; (3) to check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent; (4) to demand of the debtor full, complete, accurate, and honest disclosure ... before the attorney signs the petition; and (5) to seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.[15]

If an attorney fails to meet one of these requirements, he or she has breached the duty to perform a reasonable inquiry. In other words, an attorney cannot turn a blind eye to potential inconsistencies in the debtor's petition and absolve himself or herself from liability. He or she must take an active role in the debtor's case to ensure that the documents are complete, accurate and honest.

Courts in the First Circuit have implemented a similar five-factor test to evaluate violations of 11 U.S.C. § 707.[16] Like the test in *Garrard*, the First Circuit requires an attorney to advise the debtor of the importance of full disclosure; check for internal consistency throughout the petition, schedules, and statements; and promptly correct information that he or she discovers to be inaccurate. However, in *In re Withrow*, the court also required the attorney to employ "external verification tools," such as title records, court records, lien searches and tax transcripts, as long as the tools that were used were not overly costly or time-consuming for the attorney.[17]

The courts in *Gutierrez* and *Garrard* agreed that a negligence standard should apply to violations of § 526. *Gutierrez* applied the typical "but-for" test to address the issue of causation, which prompted the court to ask whether a more detailed inquiry by the attorney would have revealed the undisclosed information. *Garrard*, on the other hand, defined a "breach." Comparing an offending attorney's conduct to that of a reasonably competent attorney measures whether the attorney breached his duty of reasonable care. Based on the language of the statute and the prevailing case law, a court should only find that a violation of § 526 exists after it fully analyzes the claim under a traditional negligence standard. Although no court has explicitly stated this, it can be inferred from its application.

The "Reasonable Investigation" Standard under 11 U.S.C. § 707

The "reasonable inquiry" standard is often compared to the "reasonable investigation" standard under 11 U.S.C. § 707(b)(4)(D).[18] Under § 707(b)(4)(D), an attorney who signs a petition certifies that he or she has no knowledge that the information contained in the client's petition is incorrect after performing an inquiry. Unlike § 526(a)(2), violations of § 707 usually result in the dismissal of the debtor's case. However, similar to § 526(c), if a debtor's attorney violates § 707(b), the court may also assess civil penalties and award attorneys' fees and costs.[19]

The Ninth Circuit noted this comparison in *In re Kayne*.[20] In *Kayne*, a debtor told her attorney prior to filing that she had filed a lawsuit against a third party to recover money that was owed under a promissory note. To make matters worse, the debtor provided the attorney with a binder of documents that included a copy of a settlement agreement on the note and a list of payments received by the debtor, which the attorney did not review. As a result, the attorney did not disclose the note on the Schedule B and failed to list payments received as income on the Schedule I. The attorney believed that the payoff on the note was approximately $7,000 (an amount that would have been protected by the debtor's exemptions), and he explained this to the chapter 7 panel trustee at the meeting of creditors. After reviewing the settlement agreement, however, the trustee discovered that there was actually $61,250 owed on the note. The attorney admitted that he should have conducted a more thorough investigation before filing the petition.

The Ninth Circuit Bankruptcy Appellate Panel held that the debtor's attorney did not conduct a reasonable investigation into the facts of the case prior to filing the petition.[21] The court applied the same "reasonable inquiry" standard to both violations of Rule 9011 and § 707(b)(4)(D). It reasoned that the "reasonable inquiry" standard is an objective

9 Even though the court absolved the attorney of violations under 11 U.S.C. § 526, it ultimately ordered the disgorgement of fees due to violations of 11 U.S.C. §§ 527 and 528 for failure to provide required notices and a fully executed copy of the fee agreement. *Id.* at 506.

10 *Id.* at 501-02.

11 *See also Conn. Bar Ass'n v. U.S.*, 620 F.3d 81, 103 n.22 (2d Cir. 2010) (stating that violation of 11 U.S.C. § 526 is not based on strict liability, but instead requires culpable state of mind by showing either negligence or intent).

12 *See In re Casavalencia*, 389 B.R. 496 (Bankr. S.D. Fla. 2008); *In re Garrard*, Nos. 13-40418-JJR13, 13-40419-JJR13, 2013 WL 4009324 (Bankr. N.D. Ala. 2013) (applying same five-factor "reasonable inquiry" test to violations of 11 U.S.C. §§ 526 and 707, and Rule 9011).

13 Fed. R. Bankr. P. 9011(c)(2).

14 *Garrard*, 2013 WL 4009324, at *4.

15 *Id.* (quoting *In re Thomas*, 337 B.R. 879, 892 (Bankr. S.D. Tex. 2006).

16 *In re Withrow*, 391 B.R. 217, 228 (Bankr. D. Mass. 2008) (holding that attorney who failed to list six bank accounts on Schedule B and claim any exemptions on Schedule C was subject to sanctions for failing to perform reasonable investigation under 11 U.S.C. § 707(b)(4)(C) and (D)).

17 *Id.*

18 The "reasonable investigation" language actually derives from § 707(b)(4)(D)'s sister statute, 11 U.S.C. § 707(b)(4)(C), which provides that an attorney's signature certifies that he or she "performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion."

19 11 U.S.C. § 707(b)(4)(A) and (B).

20 453 B.R. 372 (B.A.P. 9th Cir. 2011).

21 *Id.* at 380.

one wherein the attorney's conduct should be compared to that of "a competent attorney admitted to practice before the involved court."[22] Because the attorney did not ask pertinent and probing questions or otherwise gather adequate information, the court imposed $20,000 in sanctions.

Other courts in the Ninth Circuit have looked favorably on the analysis in *Kayne*. In *In re Seare*, the U.S. Bankruptcy Court for the District of Nevada applied *Kayne*'s reasoning in holding that an attorney violated § 707(b)(4)(D) when he failed to investigate the dischargeability of a debt that arose from a judgment for fraud.[23] Even though the debtor's attorney filed the debtor's petition on an "emergency" basis to stop a garnishment, the court did not excuse him from compliance with § 707(b)(4)(D).[24] The attorney quickly reviewed the documents that the debtor provided to him prior to filing and made the incorrect determination that the debt underlying the garnishment would be dischargeable. The debtor did not have a copy of the judgment on the debt and therefore did not provide it to the attorney.

The court reasoned that if the attorney had reviewed the records on the court's PACER website and read the judgment prior to filing, he would have discovered that the debt was incurred due to the debtor's fraud upon the court and that the debt would be nondischargeable. The court concluded that an attorney cannot rely on the information that his or her client provides if it is clear that the information is "incomplete or inconsistent, or raises a 'red flag.'"[25] The existence of a judgment against the debtor should have alerted the attorney to the fact that a further inquiry was necessary. After that discovery, the attorney had an obligation to take an active role in the debtor's case and thoroughly review the judgment.

22 *Id*. at 382 (quoting *Smyth v. City of Oakland (In re Brooks-Hamilton)*, 329 B.R. 270, 283 (B.A.P. 9th Cir. 2005)).
23 *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013).
24 *Id.* at 212.
25 *Id.*

If a debtor fails to provide certain requested documents or cannot explain inconsistencies in his schedules, the attorney can wait to file the case, refuse to file altogether, or refuse to represent the debtor.

Conclusion

Although various courts have different ways of defining "reasonable inquiry," they are generally aligned when determining what constitutes a violation. The standard is an objective one: An attorney cannot defend himself or herself by claiming that he or she was subjectively ignorant to the murky facts of the debtor's case. Allowing such a defense would promote purposeful ignorance and result in many unwelcome surprises for unsuspecting debtors. Although not every circuit has specifically defined "reasonable inquiry" as it applies to § 526, the current trend suggests that an attorney should apply the Rule 9011 standard in the absence of such a definition.

As debtors' attorneys, we should always review relevant court records, online title and lien searches, tax transcripts, and other readily available documents. We have a clearly defined duty to ask probing questions that elicit honest and accurate answers, resolve internal and external inconsistencies by conducting a cost-effective investigation, and verify information provided by clients by requesting pertinent documents. If a debtor fails to provide certain requested documents or cannot explain inconsistencies in his schedules, the attorney can wait to file the case, refuse to file altogether, or refuse to represent the debtor. A brief and effective investigation before filing a petition can help prevent the potential costs of a violation of § 526 or Rule 9011. Even more importantly, it can facilitate the successful administration of a debtor's case. abi

ZEALOUS ADVOCACY

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WHAT IS "ZEALOUS ADVOCACY" ?

- Zealous Advocacy: has been defined by some as "doing everything reasonable, within a lawyer's means, to help a client achieve the goals set forth at the outset of the representation."
- Although the term "zealous advocate" is not specifically defined in the ABA Model Rules of Professional Conduct ("Model Rules"), it is referenced throughout the Model Rules.

ZEALOUS ADVOCACY UNDER THE MODEL RULES

- **Preamble to the Model Rules, Preamble ¶ 2 (2018)**: "[a]s advocate, a lawyer ***zealously asserts the client's position*** under the rules of the adversary system." (emphasis added).

- **Model Rule 1.3, Comment 1**: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and ***with zeal in advocacy*** upon the client's behalf.. . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." (emphasis added).

ZEALOUS ADVOCACY HAS LIMITS

- **Despite emphasizing "zealous advocacy," the Model Rules also impose limitations on a lawyer's behavior.**

  - **Model Rule 3.1, Comment 1**: "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed."

  - **Model Rule 3.5 (d):** "A lawyer shall not . . engage in conduct intended to disrupt a tribunal."

ZEALOUS ADVOCACY ≠ ABUSIVE OR DISPRUPTIVE CONDUCT

- Model Rule 3.5, Comment 4:
  - "The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."
- Model Rule 3.5, Comment 5:
  - "The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."

ZEALOUS ADVOCACY ≠ BEING DISRESPECTFUL

- *Matter of Delio*, 290 A.D.2d 61, 731 N.Y.S.2d 171 (N.Y. App. Div., 2001):
  - After arriving late to a hearing and learning that his case was dismissed, the Court permitted a lawyer to approach the bench. The lawyer engaged in an exchange with the Court where he said:
    - "This is [inaudible] other than your own self interest—. . . You're so pompous on the bench. It's ridiculous. You should remember what your jobs are. .. . I don't have to respect you if you're not— . . .You're wrong."

ZEALOUS ADVOCACY ≠ DISRUPTING COURT PROCEEDINGS

- *The Florida Bar v. Ratiner*, 238 So. 3d 117 (Fla. 2018).
  - During a post-trial hearing, the attorney was overheard saying "lie, lie, lie" while opposing counsel was questioning a witness; repeatedly kicked the leg of opposing counsel's table; and threw documents on opposing counsel's table during cross-examination.
  - During closing arguments, the attorney refused to limit his closing argument to time limits set by the Court, and told the Judge he would "take whatever time he needed."
  - During the entire trial, the attorney was "rude, overly aggressive, unprofessional and at times appeared to try to intimidate the witness"
    - The Florida Supreme Court concluded that the attorney should be disbarred.

ZEALOUS ADVOCACY ≠ MOCKING OPPOSING COUNSEL

- *Lee v. American Eagle Airlines, Inc.*, 93 F.Supp.2d 1322 (S.D. Fla., 2000):

- When awarding prevailing plaintiff attorney's fees under the statute, the Court reduced the fee awarded under the statute by $358,423.20 (more than half) because of the conduct of plaintiff's counsel, which included:
  - Entering the Courtroom at the start of trial and announcing loudly "Let's kick some ass."
  - Calling local counsel for the Defendant a "Second Rate Loser."
  - Saying each day as court began, "Let the pounding begin."
  - Asking, in front of defense counsel's client, "How are you going to feel when I take all of your client's money?"
  - When walking out of the courtroom, counsel would exclaim "Yuppies out of the way."

TWO WRONGS ≠ RIGHT

- Two lawyers in Florida – Nicholas Mooney and Kurt Mitchell – were opposing counsel in several litigation cases.
- The attorneys engaged in a series of email exchanges that became increasingly hostile and unprofessional.
- In the emails, the attorneys commented about each other, their families, and their children – including a special needs child.
- The Florida Bar filed complaints against each of the attorneys.

The Florida Bar attached several emails between the attorneys, which included the following comments:

- From Mooney:
  - After an accusation that he couldn't handle the pressures of litigation, Mooney said he has "handled case loads in excess of 200 cases, many of which were more important/significant than these little Mag[nuson] Moss [warranty] claims that are handled by bottom feeding/scum sucking/loser lawyers like yourself."
- From Mitchell:
  - "I was actually on the internet trying to find out what type of retardism you have by checking your symptoms, e.g., closely spaced eyes, dull blank stare, bulbous head, lying and inability to tell fiction from reality, so I could donate money for research for a cure."
- From Mooney:
  - "If you need to find the indications of "retardism" you seek, I suggest you look into a mirror, then look at your wife – she has to be a retard to marry such a loser like you . . . then check your children (if they are even yours. ... Better check the garbage man that comes by your trailer to make sure they don't look like him)."
- From Mitchell, after learning Mooney's son suffers from a birth defect:
  - "While I am sorry to hear about your disabled child; that sort that sort of thing is to be expected when a retard reproduces, it is a crap shoot and sometimes retards can product normal kids, sometimes they produce F***** up kids. Don't hate me, hate your genetics. However, I would look a the bright side, at least you know the kid is yours."
- From Mooney:
  - " . . . The fact that you are married means that there is truly someone for everyone, even a short/hairless jerk!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization !!!!"

ZEALOUS ADVOCACY ≠ MAKING A SCENE IN COURT, OR BEING ABUSIVE TO COURT STAFF

- *The Florida Bar v. Wasserman*, 675 So.2d 103 (Fla. 1996):
  - After an unfavorable ruling, the lawyer lost his temper, stood and shouted his criticism, waved his arms, challenged the Court to hold him in contempt and displayed his arms as if to be handcuffed stating his "contempt" for the court. The lawyer also banged on the table and generated such a display of anger that the bailiff who was present felt it necessary to call in a backup bailiff. Immediately thereafter, outside the hearing room, in the presence of both parties and opposing counsel, the lawyer stated that he would advise his client to disobey the court's ruling.
  - In another case, after getting an unfavorable response to a question asked over the telephone of a Judge through Judge's J.A., the lawyer said to J.A., "You little motherf ---- ; you and that judge, that motherf ---------- son of a b----." The J.A. was so upset by the incident that she had to leave the office early that day.

ZEALOUS ADVOCACY ≠ BEING VULGAR AND THREATENING OPPOSING COUNSEL

- *Alan Baker, et. al. v. Alstate Insurance Company, et. al.*, Case No.: 2:19-cv-08024-ODW-JC, U.S. District Court, Central District of California
  - Allstate insurance company sought an *ex parte* order dismissing the case, disqualifying plaintiff's counsel, entering a restraining order, cancelling depositions, and ordering sanctions as a result of counsel's "abusive and intolerable conduct that began with profanity-laced emails, escalated to discriminatory slurs, and culminated in repeated threats of physical violence against Allstate's witnesses, Allstate's attorneys, and their families."

Plaintiff's counsel sent dozens of abusive and threatening emails to Allstate's counsel, including ones that said:

WARNING: THE NEXT SLIDE IS NOT PG-13!

- "F--k you crooks. Eat a bowl of d--ks."
- "I'm going to let the long d--k of the law f--k Allstate for all of us."
- "Peter when you are done felating your copy boy tell Allstate the demand is now 305 million."
- "I want my clients' money gay boys."
- "Hey s--t for brains Allstate owes my clients a lot of money. It's due yesterday. Pay up f--ktard or you will be lucky to work as a notary public in El Cajon."
- "Tell Allstate I am going to water board each one of their trolls that show up for depo without any mercy whatsoever." (Klee Decl., Ex. 1, p. 18)
- "Don't make me come down there and beat out of___ you you f--king thief."
- "Well karma is a b---h mother f--ker. You are going to learn that in spades. I know where you live pete."

ZEALOUS ADVOCACY ≠ USING VULGARITY "FOR EFFECT" OR "PUFFERY"

- Plaintiff's filed a response to the Motion which argued, among other things, that he:
  - "sought to employ a confidential negotiating tactic by employing harsh language and provocative insults against counsel for ALLSTATE, out of an interest in trying to resolve this case only. The undersigned recognizes that perhaps some of the language "crossed the line" of civility and was offensive and inappropriate. *With that said, the language used was "for effect," similar to bluster or "puffery" and was not intended to actually be considered personal insults*. At no time did the undersigned threaten or intend to threaten defense counsel, their co- workers or families with harm. The undersigned apologized to defense counsel and the Court and represents and warrants that such language will not be used by the undersigned again in this matter." (emphasis added).
- At a subsequent show cause hearing, U.S. District Judge Otis Wright II demanded that Plaintiff's counsel resign from the practice of law, and also advised Plaintiff's counsel to submit an order regarding the fees and costs requested from Plaintiff's counsel.

THE RULES ALSO APPLY TO JUDGES

- *Inquiry Concerning a Judge, No. 14-255 Re: John C. Murphy*, Supreme Court of Florida
  - Judge John C. Murphy had a verbal altercation with an Assistant Public Defender, after the Public Defender refused to waive speedy trial for his client.
  - The Judge told the Public Defender: "You know if I had a rock, I would throw it at your [sic] right now. Stop pissing me off. Just sit down."
  - When the Public Defender refused to sit down, asserting his right to stand and represent his clients, the Judge responded, shouting: "I said sit down. If you want to fight, let's go out back and I'll just beat your ass." The two men left the courtroom and met in the hall.
  - The Judge then left the bench, met the Public Defender in the hall, and the two engaged in a physical altercation.
  - The Florida Supreme Court removed the Judge from office.

The Dos and Don'ts of Discovery

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I. The Rules

1. Rule 4-3.4(d), Florida Rules of Professional Conduct
   - "A lawyer must not … in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party."
   - Comment: "The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right."

2. Rules of Civil Procedure
   - Fed. R. Civ. P. 26(b)(1): Scope of discovery
     - "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant 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."
   - Fed. R. Civ. P. 26(c)(1): Protective orders
     - "A party or any person from whom discovery is sought may move for a protective order …. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense …."
   - Fed. R. Civ. P. 26(g): Signatures and certifications of discovery responses
     - By signing discovery requests, responses, and objections, "an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: (A) with respect to a disclosure, it is complete and correct as of the time it is made; and (B) with respect to a discovery request, response, or objection, it is: (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the action."

- Fed R. Civ. P. 37: sanctions for discovery failures
    - Party can compel disclosures, discovery responses, or depositions
    - If motion is granted, or if disclosure or discovery is provided after filing, court must, after giving an opportunity to be heard, require the party or attorney whose conduct necessitated the motion to pay the moving party's reasonable expenses incurred in making the motion, unless there was no good-faith attempt to confer, the failure to provide discovery was substantially justified, or other circumstances make an award of expenses unjust.
    - Provides additional, more severe sanctions for failure to comply with a court order relating to discovery

3. Local Rules
    - Middle District of Florida
        - Local Rule 2090-1(d) – Conduct of Attorneys
            - "All attorneys who appear in this Court shall be deemed to be familiar with and shall be governed by these Local Rules, the Rules of Professional Conduct, and other requirements governing the professional behavior of members of The Florida Bar. Such attorneys shall be subject to the disciplinary powers of the Court, including the processes and procedures set forth in Local Rule 2090-2. Attorneys should conduct themselves with civility and in a spirit of cooperation in order to reduce unnecessary cost and delay."
        - Local Rule 7026-2 – E-Discovery
            - Adapted from the U.S District Court for the Middle District of Florida's Civil Discovery Handbook
            - Court's goal is to "facilitate fair, open, and proportional discovery of the facts underlying a dispute so that the dispute is resolved on the merits and not by gamesmanship."
    - Southern District of Florida
        - Local Rule 2090-2(D) – Professional Conduct
            - "The professional conduct of attorneys appearing before this court shall be governed by the Model Rules of Professional Conduct of the American Bar Association as modified and adopted by the Supreme Court of Florida to govern the professional behavior of the members of The Florida Bar."

4. 28 U.S.C. § 1927
    - "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

5. Court's Inherent Authority

- In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Supreme Court held that federal courts retain inherent authority to sanction misconduct in certain circumstances regardless of whether procedural rules provide for sanctions of such conduct.
- Many courts have since relied on *Chambers* to support the use of inherent authority to sanction discovery abuses that are not otherwise sanctionable under applicable rules of civil procedure.

II. The Aspirational Standards

1. Florida Bar Standing Committee on Professionalism – Professionalism Expectations
    a. 4.7 A lawyer must not use discovery to harass or improperly burden an adversary or cause the adversary to incur unnecessary expense. (See R. Regulating Fla. Bar 4-4.4).
    b. 4.8 A lawyer should frame reasonable discovery requests tailored to the matter at hand.
    c. 4.9 A lawyer should assure that responses to proper discovery requests are timely, complete, and consistent with the obvious intent of the request. A lawyer should not avoid disclosure unless a legal privilege prevents disclosure.
    d. 4.10 A lawyer should not respond to discovery requests in a disorganized, unintelligible, or inappropriate manner, in an attempt to conceal evidence.

2. Florida Bar, Trial Lawyers Section – Guidelines for Professional Conduct
    a. Depositions
        - Depositions should be taken only when actually needed to ascertain facts or information or to perpetuate testimony. Depositions never should be used as a means of harassment or to generate expense.
        - When scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and deponents, when it is possible to do so without prejudicing the client's rights.
        - When scheduling depositions on oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.
        - Counsel should not attempt to delay a deposition for dilatory purposes, but only if necessary to meet real scheduling problems.
        - Counsel should not inquire into a deponent's personal affairs or integrity when that inquiry is not relevant to the subject matter involved in the pending action.
        - Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner that is intended to harass a witness, such as by repeating questions after they have been answered, by raising one's voice, or by appearing angry at the witness.
        - Counsel defending a deposition should limit objections to those that are well founded and permitted by the Florida or Federal Rules of Civil Procedure or applicable case law. Counsel should remember that most objections are preserved and need be interposed only when the form of the question is defective or when privileged information is sought. When objecting to the form of a question, counsel simply should state: 'I object to the form of the question.'

The grounds should not be stated unless asked for by the examining attorney. When the grounds are requested, they should be stated succinctly.

- While a question is pending, counsel should not coach the deponent nor suggest answers, through objections or otherwise.
- Counsel should refrain from self-serving speeches during depositions.
- Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer, including disparaging personal remarks or acrimony toward opposing counsel, and gestures, facial expressions, audible comments, or the like as manifestations of approval or disapproval during the testimony of the witness.

b. Document Demands

- When responding to unclear document demands, receiving counsel should attempt to discuss the demands with propounding counsel so that the demands can be complied with fully or appropriate objections can be raised.
- Document production should not be delayed to prevent opposing counsel from inspecting documents before scheduled depositions or for any other tactical reason.
- A lawyer should never use document demands for the purpose of harassing or improperly burdening an adversary or to cause the adversary to incur unnecessary expense.
- After becoming aware that an action has been initiated and to the extent practicable, a lawyer should become generally familiar with the client's records and storage systems, including electronic media, so that the lawyer may properly advise the client on production, preservation, and protection of relevant data, records, and the treatment of privileged or private information during litigation.

c. Interrogatories

- In responding to interrogatories whose meaning is unclear, receiving counsel should attempt to discuss the meaning with propounding counsel so that the interrogatories can be answered fully or appropriate objections can be raised.
- Objections to interrogatories should be based on a good faith belief and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.
- A lawyer should never use interrogatories for the purpose of harassing or improperly burdening an adversary or to cause the adversary to incur unnecessary expense.

III. Sanctionable Conduct

1. *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536 (11th Cir. 1993)
   - After affirming imposition of sanctions pursuant to section 1927 and the court's inherent authority, court took the opportunity to "remark on the disturbing regularity with which discovery abuses occur within our courts today."

- "The Federal Rules of Civil Procedure were adopted in 1937 in the hope of securing 'the just, speedy, and inexpensive determination of every action.' FED.R.CIV.P. 1. Today, fifty-six years later, the drafters of these rules certainly would be disappointed to see how far from that ideal we remain. The discovery rules in particular were intended to promote the search for truth that is the heart of our judicial system. However, the success with which the rules are applied toward this search for truth greatly depends on the professionalism and integrity of the attorneys involved. Therefore, it is appalling that attorneys, like defense counsel in this case, routinely twist the discovery rules into some of 'the most powerful weapons in the arsenal of those who abuse the adversary system for the sole benefit of their clients.'"
- "All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself. In England, the first licensed practitioners were called 'Servants at law of our lord, the King' and were absolutely forbidden to 'decei[ve] or beguile the Court.' In the United States, the first Code of Ethics, in 1887, included one canon providing that 'the attorney's office does not destroy ... accountability to the Creator,' and another entitled 'Client is not the Keeper of the Attorney's Conscience.'"
- "Unfortunately, the American Bar Association's current Model Rules of Professional Conduct underscore the duty to advocate zealously while neglecting the corresponding duty to advocate within the bounds of the law. As a result, too many attorneys have forgotten the exhortations of these century-old canons. Too many attorneys, like defense counsel in this case, have allowed the objectives of the client to override their ancient duties as officers of the court. In short, they have sold out to the client."
- "We must return to the original principle that, as officers of the court, attorneys are servants of the law rather than servants of the highest bidder. We must rediscover the old values of our profession. The integrity of our justice system depends on it."

2. Misconduct in depositions and document review
   - *Zottola v. Anesthesia Consultants of Savannah, P.C.*, No. CV411-154, 2012 WL 6824150 (S.D. Ga. June 7, 2012)
     - During one deposition, counsel asked improper sensitive personal questions, balked at attempts to rein in harassing questions, yelled at deponent, and leaned across table in hostile manner.
     - During another, after "daring" opposing counsel to call the judge, counsel tossed his phone across the table at her, causing it to land noisily in front of her.
     - "Yelling at deposition witnesses, harassing and embarrassing them with questions about highly sensitive matters irrelevant to the litigation, and rudely tossing a phone at opposing counsel in anger are all offensive behaviors that fall well outside the bounds of professional conduct. Such incivilities not only constitute conduct unbecoming a member of the bar but violate specific rules that govern the practice of law before this Court."

- As a result, court imposed conditions and restrictions on additional depositions, including videotaping and limitations on questions and time.

- *The Florida Bar v. Ratiner*, 238 So. 3d 117 (Fla. 2018)
  - During deposition, attorney leaned across table, shouted at opposing counsel, and threw a wadded-up evidence sticker at opposing counsel.
  - During document review session, attorney referred to opposing counsel as a "dominatrix" and attempted to forcibly grab opposing counsel's copy of the index of boxes out of her hands, causing a security guard to intervene.
  - Following deposition misconduct, attorney was suspended for 60 days, publicly reprimanded, and subject to two-year probationary period. Video of the incident was also permitted to be shown in courses on professionalism.
  - Following document review misconduct, attorney was suspended for 3 years and has since been disbarred.
- *In re Neurontin Antitrust Litig.*, 2011 WL 253434, at *12 (D.N.J. Jan. 24, 2011); *City of N.Y. v. Coastal Oil NY, Inc.*, 2000 WL 97247, at *2 (S.D.N.Y. Jan. 27, 2000)
  - Attorneys should avoid making objections or interjecting in a manner that appears to be coaching the witness.
  - Examples: if you know, if you remember, stating counsel does not understand the question, trying to recharacterize witness's testimony
  - In *Neurontin*, court struck all deposition objections, ordered the redeposition of a witness at offending party's expense, and limited evidence that could be offered at trial.
  - In *Coastal Oil*, court admonished counsel and ordered new videotaped deposition at offending parties' expense.
- *In re Steffen*, No. 8:01-bk-09988-ALP (Bankr. M.D. Fla. May 15, 2009)
  - Attorney failed to appear for depositions, failed to ensure appearance of witnesses at depositions, interposed inappropriate objections, and prematurely ended a deposition.
  - "Modern discovery was designed to eliminate litigation by ambush and surprise. Cooperation and candor by all parties are crucial to the proper function of the discovery process; obstreperous conduct and deceptive tactics designed to delay and impede have no place in the discovery process."
  - Court imposed monetary sanctions on attorney "for his continual obstructive, defiant and inappropriate behavior in impeding, delaying and frustrated scheduled depositions of witnesses and the Debtor."
- *Paramount Commc'ns v. QVC Network*, 637 A. 2d 34 (Del. S. Ct. 1994)
  - During deposition, attorney improperly instructed witness not to answer, used foul language, and disparaged opposing counsel.
  - Court did not impose sanctions at that time but invited counsel's "voluntary appearance" to explain why his conduct should not be considered as a bar to any future pro hac vice appearance by him.

3. Plainly unreasonable discovery requests
   - *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292 (11th Cir. 2011)

- Court found attorney had obviously drafted discovery requests without any effort to constrain them within the bounds set for discovery by the court.
- Court upheld monetary sanctions for fees incurred by opposing party in resisting improper discovery demands.

4. Obstruction of legitimate discovery requests
   - *In re Atl. Int'l Mortg. Co.*, 352 B.R. 503 (Bankr. M.D. Fla. 2006)
     - Court observed that discovery disputes had taken over case:
       "A significant amount of talent, money, and time has been expended on discovery in this proceeding. This Court is satisfied that the conduct of the [party] and its counsel has been totally devoid of the cooperation required by the rules governing discovery, it was even bordering on obstruction. The [party] and their counsel have fought tooth and nail from the outset of this case to prevent and delay any meaningful discovery. They have responded to the Trustee's legitimate discovery requests with disingenuity, obfuscation, and frivolous claims of privilege. They have twice filed meritless appeals of non-appealable discovery orders in attempts to prevent meaningful discovery by the Trustee."
     - "Modern discovery was designed to eliminate litigation by ambush and surprise. Cooperation and candor by all parties are crucial to the proper function of the discovery process; obstreperous conduct and deceptive tactics designed to delay and impede have no place in the discovery process."
     - Court imposed sanctions in amount of more than $300,000 in attorneys' fees.

5. Facilitating the client's abuse of the discovery process, in violation of Rule 26(g)
   - *Carter v. Butts Cty., Ga.*, No. 5:12-cv-209 (LJA), 2016 WL 1274557 (M.D. Ga. Mar. 31, 2016)
     - Attorney sanctioned for violating obligations under Rule 26(g) where he was aware of information opposing party sought to uncover and failed to disclose it without substantial justification; failed to make reasonable inquiry and interposed improper objections.
   - *DeCastro v. Kavadia*, 309 F.R.D. 167 (S.D.N.Y. 2015)
     - Court found attorney "exacerbated the effects of" client's misconduct.
     - The total effect of counsel's conduct was to veil the client's misconduct, requiring imposition of sanctions.
   - *King v. Dillon Transp., Inc.*, No. CV411-028, 2012 WL 592191 (S.D. Ga. 2012)
     - "Instead of outright lies and sabotage, this case involves a party and an attorney who ultimately produced the requested discovery, but did so piecemeal and only after unnecessary effort and expense on the part of defendant's counsel."
     - "Still, this form of discovery abuse is serious enough and is deserving of sanctions. Discovery is not a game of cat and mouse, of continual pursuit and near capture by one party and endless escape by the other. … Judicial involvement should be reserved for those genuine disputes that infrequently occur about the scope of discovery or some asserted privilege. But far too

frequently courts are forced to deal with dawdling, foot-dragging, discourteous, or mean-spirited litigants or counsel about petty disputes that could have been avoided had counsel simply lived up to their clear obligations under the rules."
    - Counsel's conduct reflected "a misunderstanding of the rules and a lack of the professionalism and courtesy demanded of this Court's bar."
    - As a sanction, court required counsel to handwrite a verbatim copy of Rule 26(g) and submit it to the court
- *Tom v. S.B., Inc.*, 280 F.R.D. 603 (D.N.M. 2012)
    - Attorney committed sanctionable acts by certifying incomplete and false responses to discovery requests, misstating facts in briefing on discovery motions, and withheld discoverable information.
    - "Like a George[s] Seurat painting, the closer you get to this case, the messier it gets. I can honestly say that I am shocked by the extent of the discovery abuses here. For the most part, the judiciary runs on the honor system. We trust that attorneys and parties will play fair. However, while the Court hopes and expects that all litigants and attorneys will remember their ethical duties, we are armed with tools to punish those who play dirty."
- *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997)
    - Attorney falsely stated in response to requests for production that all relevant medical records had been produced, even though he knew his client had taken some records which were not produced.
    - Attorney suspended for three years.

2019 WL 3316133
Only the Westlaw citation is currently available.
United States Bankruptcy Court, N.D. Florida, Pensacola Division.

IN RE: Michael Edward CAMFERDAM, Debtor.
Raymond James and Associates, Inc., Plaintiff,
v.
Michael Camferdam, Defendant.

CASE NO.: 18-30160-KKS
|
ADV. NO.: 18-03009-KKS
|
Signed May 15, 2019

Attorneys and Law Firms

Christopher T. Conte, Helmsing Leach Herlong Newman & Rous, Mobile, AL, for Plaintiff.

Philip Alan Bates, Sarah St. John Walton, Philip A. Bates, P.A., Pensacola, FL, John E. Venn, John E. Venn, Jr., P.A., Gulf Breeze, FL, for Defendant.

ORDER DENYING, WITHOUT PREJUDICE, *RAYMOND JAMES' MOTION FOR PROTECTIVE ORDER* (DOC. 47)

KAREN K. SPECIE, Chief U. S. Bankruptcy Judge

***1** THIS MATTER is before the Court on *Raymond James' Motion for a Protective Order,* supplement and Affidavit in support (collectively referred to as "Motion") and Defendant's response ("Response," Doc. 58). [1] For the reasons set forth below, the Motion is denied, without prejudice, subject to the agreement the parties have apparently reached on the Motion, which they apparently intend to announce at the hearing on the Motion scheduled for May 15, 2019. [2]

In the Affidavit in support, counsel for Plaintiff certified that

> [p]rior to filing the [Motion], Raymond James undertook *good faith efforts to confer with Defendant regarding the scope of discovery* ... in an attempt to limit discovery to the remaining pending claims in the Adversary Proceeding.... [3]

This certification is insufficient.

The Federal Rules of Bankruptcy Procedure provide that when seeking a protective order, the movant must include a certification that it "has *in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without Court action*." [4] This Court's local rules provide that in adversary proceedings, "counsel for the moving party *shall confer* with counsel for the opposing party and shall file with the Court ... a statement certifying that he has *conferred* with counsel for the opposing party in a good faith effort to resolve by agreement the issued raised ..." [5] Rule 7.1 (B) of the Local Rules for the District Court for the Northern District of Florida provides:

> [b]efore filing a motion raising an issue, an attorney for the moving party must attempt in good faith to resolve the issue through a meaningful conference with an attorney for the adverse party. The adverse party's attorney must participate in the conference in good faith. The conference may be conducted in person, by telephone, in writing, or electronically, but an oral conference is encouraged. *An email or other writing sent at or near the time of filing the motion is not a meaningful conference.* [6]

The Motion is devoid of any certification that the parties conferred, as the applicable rules require.

***2** It has become abundantly clear from the instant Motion and prior motions filed in this adversary proceeding that a more direct approach to discovery disputes is needed. This Order is designed to instruct counsel and ensure that going forward the parties resolve, by agreement wherever possible, discovery and other disputes and follow the rules requiring that they actually *confer* before filing similar motions. With

these goals paramount, this Order shall give the parties a more thorough understanding of the Court's view of most discovery disputes. [7]

In the undersigned's experience, from nearly thirty years as a litigator and now numerous years as a judge, the great majority of discovery disputes arise when one or both sides exhibit: (1) failure to grasp, or disdain for, the law, the rules, or the facts, (2) lack of professionalism, (3) lack of civility, (4) refusal to extend common courtesy to a fellow professional (and therefore to the Court), (5) bad faith, or (6) some or all of the above. It is sad to say, but true, that it is rare to see a truly justiciable discovery issue requiring thoughtful consideration and resolution by the Court which the parties have tried, *in good faith,* to resolve before requesting the Court's intervention.

The Court is well aware that lawyers may do and say things during discovery that they would not dream of doing or saying if a judge were present. Certain conduct is unprofessional: counsel not returning telephone calls, always being "unavailable," refusing to agree to reasonable requests from opposing counsel on the basis that "my client won't let me," screening every communication through two layers of staff, firing off e-mails "confirming" something that was not agreed, and sending emails demanding action in an unreasonably short time, under threat of "filing something with the court."

Failure of counsel to effectively communicate, or to communicate other than via email or in letters, will not be tolerated; it does a disservice to the parties and the Court. The Court has no interest in reading email exchanges between counsel complaining about not having heard back from a discovery request, a phone call or a prior email. If such communications are attached to discovery motions, they will either be ignored or stricken from the record.

Claims of ethical violations are not taken lightly. If you have made such an accusation against opposing counsel, you have done so at your peril if you are not prepared to prove it.

Fishing expeditions and questions and requests unlimited in time or place are disfavored, as are totally unsupported objections to discovery based on the usual boilerplate assertions that the request is overly broad or unduly burdensome, or that the information sought is irrelevant, privileged, or is unlikely to lead to the discovery of admissible evidence. A party must present something to back up this type of objection or it will be overruled.

If a party has answered a discovery request "subject to" or after "reserving" an objection (or similar phrase), that party has waived the objection. A party either has a sustainable objection or it does not. Parties cannot have it both ways. [8] Counsel should not assume that they will prevail on an argument that a common English word is "vague" or "ambiguous." If a party asserts that something is burdensome, that party must accompany the objection with facts to show it. In short, if discovery demands or responses are not well thought out and clearly presented, you are on shaky ground indeed.

***3** Because the Court has not ruled on the merits of the Motion, and because the parties have apparently resolved the issues raised in the Motion by agreement to be announced at the hearing, the below provisions will pertain to any future discovery disputes in this adversary proceeding. For the reasons stated,

It is ORDERED:

1. *Raymond James' Motion for Protective Order* (Doc. 47) is DENIED, without prejudice, subject to any agreement the parties may have reached in resolution of the Motion prior to entry of this Order.

2. For future discovery disputes, if any:

a. If counsel can completely resolve issues pertaining to discovery disputes without an in-person conference, the Movant should file a notice withdrawing discovery-related motions or a stipulation addressing all pending discovery disputes.

b. If the issues are not completely resolved without an in-person conference, lead counsel or attorneys with full authority to make decisions and bind the client(s) without later seeking approval from a supervising attorney or some other decision maker will meet personally or by video conference and in good faith attempt to resolve or narrow the dispute(s). If counsel cannot agree on a time, date or location for this conference, they will meet in the witness room outside the Courtroom at the United States Bankruptcy Courthouse in Tallahassee, Florida. The parties will schedule this conference at a time when the undersigned is in Chambers or available via telephone, so that if

a dispute cannot be resolved during the meeting the parties can request the Court to convene an immediate conference or hearing at which to resolve the dispute.

c. If the attorneys meet at the Courthouse, lead counsel will attend. No later than three (3) business day after such conference, the parties will jointly file the results of their discussion, including all agreements, undertakings, promises and/or concessions, and will specifically identify any issues that remain for determination by the Court, without further briefing or argument.

d. If the Court rules, with or without a hearing, on motions to compel discovery and/or motions for protective order, the party prevailing overall, as determined by the Court, will be awarded its costs and expenses after the non-prevailing party has been given the opportunity to be heard. The costs will likely include, but not be limited to, (1) the time required to file pleadings, prepare for, travel to and attend the required meeting, and, if necessary, the time required to prepare for, travel to, and attend the hearing, and (2) the actual cost of Court reporting, travel, sustenance and accommodations for all of the above. The costs will be paid by the non-prevailing attorney and not charged to the client unless counsel provides written proof that the client insisted on going forward against counsel's advice.

e. In the unlikely event that a discovery dispute turns out to be one of those rare cases involving a truly justiciable issue, such as a case of first impression, the Court will not impose sanctions. The Court will decide whether that criterion is met.

3. Counsel will provide a copy of this order to their respective clients and any other attorneys within their firms that will be or have been active in this proceeding.

DONE and ORDERED on May 15, 2019

All Citations

Slip Copy, 2019 WL 3316133

Footnotes

1 Docs. 47, 50 and 53.

2 As the Court was in the process of finalizing this Order after having spent considerable time and resources thoroughly reviewing the Amended Complaint, the Motion and other related pleadings, the Court was advised that the parties have resolved the discovery dispute that prompted the Motion. The Court nonetheless issues this Order to ensure that the attorneys and parties will have a much clearer perception of how the Court views discovery disputes such as the one here.

3 Doc. 53 (emphasis added).

4 Fed. R. Civ. Pro. 26(c)(1) made relevant by Fed. R. Bankr. P. 7026 (emphasis added).

5 N.D. Fla. LBR 7007-1(A) (emphasis added).

6 N.D. Fla. Loc. R. 7.1(B)(emphasis added). A motion or supporting memorandum must contain a certificate that the moving party complied with the attorney conference requirement. N.D. Fla. Loc. R. 7.1(C); N.D. Fla. LBR 1001-1(D) provides that the Local Rules of the United States District Court, Northern District of Florida shall apply in all bankruptcy cases, including contested matters.

7 This Order applies to the issues raised in the instant Motion as well as to pending and future discovery disputes.

8 *Pensacola Firefighters' Relief & Pension Fund Bd. of Trs. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 3:09CV53/MCR/MD, 2009 WL 3294002, at *2 n.1 (N.D. Fla. Oct. 13, 2009)(citing "*Meese v. Eaton Mfg. Co.*, 35 F.R.D. 162, 166 (N.D. Ohio 1964)(holding that '[w]henever an answer accompanies an objection, the objection is deemed waived, and the answer, if responsive, stands.'). *See also,* Wright, Miller & Marcus, *Federal Practice and Procedure: Civil* § 2173: 'A voluntary answer to an interrogatory is also a waiver of the objection.' ").

Faculty

Jacob A. Brown is a partner with Akerman LLP in Jacksonville, Fla., where he practices in the areas of bankruptcy, creditors' rights and commercial litigation. He is a member of the Jacksonville Bar Association, ABI, and the Florida and Georgia Bar Associations, and he is a past-president and chairman of the Jacksonville Bankruptcy Bar Association. Mr. Brown currently chairs the Florida Bar Business Law Section and is past chair of the Section's Bankruptcy/UCC, Bankruptcy Judicial Liaison and Legislative Committees. He is admitted to practice in the federal and state courts of Florida and Georgia and the U.S. Court of Appeals for the Eleventh Circuit. Following law school, Mr. Brown clerked for Hon. Jerry A. Funk, U.S. Bankruptcy Judge for the Middle District of Florida. He received two B.S. degrees from North Carolina State University's Schools of Engineering and Forestry in 1994 and his J.D. from Samford University's Cumberland School of Law in 1998, where he was a member of Cumberland's trial advocacy program.

Betsy C. Cox is a shareholder with Rogers Towers, PA in Jacksonville, Fla., where her practice is concentrated on bankruptcy, banking and commercial litigation. She has more than 35 years' experience in these areas, including representing primarily secured and unsecured creditors in all aspects of numerous bankruptcy cases and related adversary proceedings; representing financial institutions in enforcing commercial and real estate loans and leases, foreclosing on collateral, obtaining receivers, defending lender liability claims, and structuring workouts; and handling a wide variety of cases in state and federal courts through trials and appeals involving contract, real estate, shareholder and partnership disputes and business torts. Her practice also focuses on probate, trust and guardianship litigation. Ms. Cox is the past chair of her firm's Business Litigation Practice Group and is in charge of its Womens' Network. She also is a past president and chair of the Jacksonville Bankruptcy Bar Association and a former member of the Local Rules Committee for the U.S. Bankruptcy Court for the Middle District of Florida. Ms. Cox is a member of both the Florida and Georgia Bars and is listed in *The Best Lawyers in America* and rated AV-Preeminent by Martindale-Hubbell. She received her B.A. *summa cum laude* from The University of the South and her J.D. *cum laude* from the University of Georgia School of Law.

Prof. Roberta Kemp Flowers is a professor of law at Stetson University College of Law in Gulfport, Fla. Within the Elder Law LL.M. program, she teaches ethics in an elder law practice. She also teaches evidence, criminal procedure and professional responsibility. While at Stetson, Prof. Flowers has successfully coached trial teams, arbitration teams and moot court teams to national championships. She has also served as the director of the Center for Excellence in Advocacy and as the William Reece Smith Jr. Distinguished Professor in Professionalism. During her time at Stetson, Prof. Flowers has received the university-level Excellence in Teaching Award, Most Inspirational Teacher Award from the Student Bar Association, and an award from the Student Bar Association for supporting student life. She also has received the university-level Homer and Dolly Hand Award for Excellence in Scholarship, the Dean's Award for Extraordinary Service, and been awarded the Distinguished Service Award four times. In 2005, the Florida Supreme Court awarded her the Faculty Professionalism Award. Prof. Flowers has lectured worldwide on the topic of ethics. She won a Telly Award for Excellence in Educational Films for having produced a series of educational videos on the ethical issues faced by prosecuting attorneys. She also co-created a video series used to train and educate attorneys nationwide on the ethical dilemmas faced by elder law attorneys. The Florida Supreme Court awarded Prof. Flowers the Florida Supreme Court Professionalism Award for her work on the

video productions. She also co-designed the nation's first "elder friendly courtroom," which serves as model for courtrooms of the future. Previously, Prof. Flowers worked as a prosecutor in both the state and federal system. She began her career in 1984 as a deputy district attorney for the 18th Judicial District of Colorado, where she served as a trial attorney in the criminal division. In 1989, she was appointed assistant U.S. attorney for the Southern District of Florida, where she served in the Appellate Division, the Major Crimes Unit and the Public Corruption Unit. Prof. Flowers's research interests center on the issues of ethics and professionalism. Her articles have appeared in such journals as the *Fordham Law Review*, the *Boston College Law Review*, *Missouri Law Review*, the *Nebraska Law Review*, the *Ohio State Journal of Criminal Law*, *Hastings Constitutional Law Quarterly*, the *Stetson Law Review* and the *NAELA Journal*. Prof. Flowers received her Bachelor's degree *magna cum laude* in psychology from Baylor University in 1979 and her J.D. from the University of Colorado in 1984, where she was selected to be a member of the Order of the Coif.

Jerry M. Markowitz is a founding shareholder of Markowitz Ringel Trusty + Hartog, P.A. in Miami and a member of the firm's Bankruptcy and Creditors' Rights practice group. He concentrates his practice in the areas of creditors' and debtors' rights, including workouts, bankruptcy, asset recovery, insolvency, receiverships, reorganizations, restructuring and mediation. Mr. Markowitz is listed in *The Best Lawyers in America*, *Chambers USA* in the bankruptcy and restructuring category, the "Top 250 Attorneys in South Florida" by the *South Florida Legal Guide*, *Super Lawyers "*Top 100 Lawyers in Florida," and the "Best of the Bar" by the *South Florida Business Journal*. He was also was also recognized by *Florida Trend*'s Hall of Fame for being named in their Florida Legal Elite list for the past 10 years. Mr. Markowitz is a member of the Florida Bar, ABI (for which he has served on its Board of Directors, the American Bar Association's Business Law, Business Bankruptcy Committee and Commercial Financial Services Committee Sections, and the Continuing Legal Education Committee for the University of Miami Bankruptcy Skills Workshop (for which he has served as chairman and co-chairman), and he is a member of, and a former president of, the Bankruptcy Bar Association for the Southern District of Florida. He is also the past president of the University of Miami School of Law Alumni Association. As an active ABI member, Mr. Markowitz is a regional chair for ABI's Endowment Fund and co-Education Director of ABI's Mediation Committee. He also sits on the advisory board of ABI's Caribbean Insolvency Symposium, and has served as faculty for the ABI/St. John's University School of Law's mediation training program. He is a certified mediator in Florida. Mr. Markowitz received his B.S. in business administration with a concentration in accounting from the University of Florida and his J.D. from the University of Miami School of Law.

Hon. Catherine P. McEwen is a U.S. Bankruptcy Judge for the Middle District of Florida in Tampa, appointed by the Eleventh Circuit Court of Appeals on Aug. 22, 2005, and an adjunct professor at Western Michigan University Cooley Law School. She is the first female judge appointed in her district. Prior to becoming a judge, she was in private practice for almost 23 years in Tampa and was a solo practitioner from 2001 until the date of her appointment to the bench. Before opening her solo practice, she was a shareholder of Akerman Senterfitt & Eidson, P.A., formerly known as Moffitt, Hart & Herron, P.A., where she practiced law from 1982-2001 in its Tampa office, concentrating on commercial litigation with an emphasis on representing parties in bankruptcy cases. Judge McEwen was elected into the American Law Institute in 2012. Among her other honors are the Stetson University College of Law Distinguished Alumnus Award (2007), Hillsborough County Bar Association Jimmy Kynes Pro Bono Service Award (2008), the Stetson University College of Law J. Ben Watkins Award (2009), the Florida Association for Women Lawyers Leaders in the Law inaugural class

designation (2010), the Tampa Bay Hispanic Bar Association's Luis "Tony" Cabassa Award (2012), the George Edgecomb Bar Association's Delano S. Stewart Diversity Award (2015), the inaugural Florida Supreme Court Chief Justice's Distinguished Federal Judicial Service Award (2016), the Stetson Lawyers Alumni Association Ben C. Willard Award (2016), the University of South Florida Distinguished Alumna Award (2016) and the Bay Area Legal Services Inc. Judge Don Castor Justice Award (2016). In 2017, Judge McEwen was appointed by Chief Justice John Roberts, Jr. to serve a two-year term as the nonvoting bankruptcy judge observer to the Judicial Conference of the United States, which ended on Sept. 30, 2019. Prior to becoming a lawyer, she was a sportswriter from 1975-79 for the *Tampa Tribune* and the *Tampa Times*. Judge McEwen received her B.A. in political science from the University of South Florida in 1979 and her J.D. *cum laude* from Stetson University in 1982.