



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Rocky Mountain Bankruptcy Conference

Witness: The Honorable Practice of Bankruptcy

Ralph R. Mabey

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Ralph R. Mabey is a Professor of Law at the S. J. Quinney College of Law, University of Utah, and of counsel to the firm of Kirton | McConkie. He received his law degree from Columbia University where he served on the Board of Editors of the Columbia Law Review. Judge Mabey served with distinction as a United States Bankruptcy Judge before returning to private practice and teaching. His judicial opinions have been cited frequently by courts and scholars.

Judge Mabey is the past President and Chair of the American College of Bankruptcy. He served as an appointee of the Chief Justice of the United States to the U.S. Judicial Conference's Advisory Committee on the Bankruptcy Rules. He has also served as a managing editor of the *Norton Bankruptcy Law Journal*, on the Editorial Advisory Board of the *American Bankruptcy Law Journal*, and as a Contributing Author to *Collier on Bankruptcy*.

He is a member of the National Bankruptcy Conference, the American Law Institute, and a founding member of the International Insolvency Institute.

Courts, parties and the Department of Justice (U.S. Trustee Program) have appointed Judge Mabey to serve as mediator, arbitrator, examiner or trustee in Alaska, Arizona, California, Delaware, Louisiana, Michigan, New York, Texas, Utah, Virginia and Washington, D.C.

Judge Mabey recently served as a court-appointed mediator in the Lehman Brothers cases. He has served as Examiner in Extended Stay Hotels, as Chapter 11 Trustee in Cajun Electric Power Cooperative and as Neutral Evaluator in the City of Stockton, California, restructuring.

Judge Mabey's service in complex workout, bankruptcy, reorganization and litigation matters also includes: A.H. Robins Company (as examiner with expanded powers); Dow Corning (as counsel for certain bondholders); Columbia Gas System (as equity committee counsel); Federated Department Stores (as counsel for the official pre-merger bondholders committee); TWA (as counsel for the pilots). He has served as an expert consultant or expert witness in a number of important matters including ASARCO and Residential Capital.

Judge Mabey is a member of the New York and Utah Bars.

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24 Teachings of Law Practice

By Ralph R. Mabey

(1) EXCEPTIONAL PREPARATION BEATS EXCEPTIONAL INTELLECT.

Good lawyering is earned not bequeathed.

(2) PREPARATION BEATS PRETENSION, TOO.

The best lawsuit is not determined by the lawyer's best suit. Victory doesn't go to the best dressed, but the best redressed.

(3) PROMPT DISCLOSURE IS OFTEN THE BEST DISENTECTANT.

Prompt disclosure of your shortcomings to your client minimizes the risk of being sued. Prompt disclosure to the court minimizes the risk of being held in contempt. Prompt disclosure to the public minimizes the risk of being held in public contempt.

(4) LIFE IS TOO SHORT TO WORK FOR CLIENTS YOU CAN'T TRUST.

Unless appointed by the court or otherwise acting in the public interest, it's better to be unemployed.

(5) LAWYERS WHO CAN'T SEE ETHICAL DIRT, CAN'T AVOID IT.

Avoid conflicts by asking yourself conflicts questions.

(6) FIDUCIARY DUTY IS EASIER TO OFFEND THAN TO DEFINE.

Courts have 20/20 hindsight when defining "a punctilio of an honor most sensitive."

(7) IN COMMERCE, WISE COUNSEL MUST INCLUDE LEGAL COUNSEL.

Otherwise, even the honest and well-intentioned business person may offend the law.

(8) HUMAN JUSTICE IS IMPERFECT JUSTICE.

While it is our job to improve it, human justice may fall short. After all, those spitefully used are not promised treble damages. Consider settling.

(9) THE CONSTITUTION ONLY RECITES OUR FREEDOMS; THE LAWYER EARNS THEM.

Constitutional rights are not self-executing. We must often earn the benefits of the Constitution and the law for our clients.

- (10) **DISCOVERY MAY REVEAL AS MUCH ABOUT THE OPPOSING LAWYER AS ABOUT THE CASE.**

The means a lawyer employs will define that lawyer, personally and professionally, at least as much as the results obtained.

- (11) **A LAWYER'S RHETORIC IS MORE LIKELY TO IMPRESS THAT LAWYER THAN ANYBODY ELSE.**

It just sounds so clever when we say it ourselves. But lucidity trumps loquacity. And joke-telling is dangerous: The safest joke to tell is the one on you.

- (12) **AN ARROGANT LAWYER IS A LOADED REVOLVER, A HUMBLE LAWYER IS A PROBLEM SOLVER.**

Pride obscures judgment and weakens our ability to listen, analyze and assess. Humility sharpens our observations, strengthens our judgment and gets our egos out of the way.

- (13) **A LAWYER'S FEAR OF LEAVING A DOLLAR ON THE TABLE USUALLY COSTS HIS CLIENT MORE THAN THAT DOLLAR.**

As a result, to measure your success by your opponent's failure is a double-negative: his and yours.

- (14) **ONE OF THE GREATEST TESTS OF HONESTY IS THE BILLABLE HOUR.**

Was the time expended? Was it worthwhile?

- (15) **IF YOUR CLIENT THINKS YOU KNOW MORE THAN YOU DO, YOU FACE ANOTHER GREAT TEST OF A LAWYER'S HONESTY.**

When your client overestimates you, it's hard not to play the expert – especially at our hourly rates.

- (16) **HARD PROBLEMS ARE USUALLY SOLVED BY WEARING THEM DOWN.**

Don't let your problem-solving ideas, initiative, and actions wear out before the problem does.

- (17) **A LAWYER WHO FILES A RESPONSIVE PLEADING A DAY EARLY IS A LAWYER WHO MISCOUNTED.**

Lawyer procrastination is endemic and epidemic.

(18) YESTERDAY'S VICTORY IS GOOD FOR GETTING CLIENTS; BUT NOT FOR KEEPING THEM.

A client is proud of your good record, until her trial begins. No other success can compensate for failure in her own.

(19) LAWYERS ARE AN INSECURE LOT; EITHER THEIR PRACTICE IS TOO BUSY AND THEY FEAR MALPRACTICE OR TOO SLOW AND THEY FEAR UNEMPLOYMENT.

A law practice breeds insecurity because outcomes and opportunities are sometimes hard to predict.

(20) “NICE” CLIENTS WHO WANT HANNIBAL LECTER FOR A LAWYER DESERVE WHAT THEY GET.

When “nice” clients want you to draw, quarter and devour your opponent, remember: from a moral perspective, you, and your client, become what you do.

(21) LAWYER JOKES AND HUMOR INTERSECT ONLY OCCASIONALLY.

However, I can't recall an example offhand.

(22) ACTING AND LAWYERING HAVE ONE PRINCIPAL DIFFERENCE: NOBODY APPLAUDS LAWYERS.

On the other hand, there seems to be work for more lawyers than actors.

(23) SCHEDULING A LAW PRACTICE IS AS DIFFICULT AS SCHEDULING THE WEATHER; IT IS GOING TO SNOW YOU IN AT THE WRONG TIME.

Since you can't change the weather, enjoy it; Being snowed in can be pretty, and pretty exciting.

(24) PRACTICING LAW IS LIKE FASTING: IT CAN BE GOOD FOR THE SOUL – UNTIL IT KILLS YOU.

Balance is the point. Avoid too much of a good thing.

The Honorable Practice of Bankruptcy Law

Hon. Ralph R. Mabey (Ret.)
Kirton McConkie
Professor of Law, University of Utah,
S.J. Quinney College of Law

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In the teeth of the irreconcilable demands of justice and mercy Javert took his own life

Les Miserables

by
Victor Hugo

- Javert: the straight line of the law
- Jean Valjean: the straight line of mercy

Balancing Mercy and Justice is An Ennobling Endeavor:

- "Mercy does not destroy Justice, but achieves its perfect fulfillment. Mercy without Justice is the mother of chaos; Justice without Mercy is the father of cruelty."
- Thomas Aquinas

On the facts presented to Javert, justice and mercy were irreconcilable



Justice & Mercy by Glynn Acree at Cumberland School of Law. [The statue grew out of a phrase, "Seek wisdom to temper justice with compassion". The concept is the Angel of Mercy is encouraging Lady Justice to stay the sword from being used too swiftly, tempering it with compassion.]

Chapter 13:

An imperfect congressional mandate to reconcile justice and mercy--or as BAPCPA puts it reconciling:

Bankruptcy Abuse
Prevention and Consumer
Protection

Chapter 13 Trustee

JUSTICE

- Investigate Debtor's financial affairs
- Verify and account for Debtor's income and assets
- Ensure Debtor's compliance with Code & plan requirements
- Distribute to unsecured creditors all of Debtor's projected disposable income
- Assess and monitor Debtor's compliance, honesty and good faith
- Where appropriate enforce the law against the Debtor

Chapter 13

JUSTICE

Creditors

- All income and assets accounted for to maximize return to creditors
- Secured creditor's right to value-equivalence of collateral
- Home mortgage and 910-car lenders protected from modification
- Taxes and DSO paid in full
- Unsecured creditor's right to projected disposable income
- Debtor's increase in income over 3-5 years may be required to increase return to creditors.
- Relief from stay or dismissal for failure to comply with plan
- Non-dischargeability protection against dishonesty

Chapter 13 Trustee

MERCY

- Advise the Debtor (other than on legal matters)
- Assist the Debtor in performance under the plan
- Provide Debtor with the resources and information necessary to successfully complete the plan
- Review creditors' claims for accuracy
- Ensure Creditors properly apply plan payments.
- Verify the Debtor obtains financial management instruction
- Where appropriate enforce the law for the Debtor

Chapter 13

MERCY

Debtors

- Relief from collection pressures
- Protection of home & cars as necessary for family & work
- Protection of income that is reasonably necessary for maintenance & support of household
- Protection of expenses for care of aged, ill, or disabled family members
- Protection of children's school expenses
- Protection of Social Security income
- Possible protection of retirement contributions
- Protection of charitable contributions
- Honesty and good faith rewarded
- Fresh start

Chapter 13 Debtor's Counsel

JUSTICE

- Co-guarantor of Debtor's honesty and good faith
- Ensure Debtor's compliance with required plan provisions and budget allotments
- Financial management training
- Reality, moderation and prudence

Chapter 13 Debtor's Counsel MERCY

- Help Debtor make hard choices for long-term benefit
- Advocate for the best deal with creditors & trustee
- Carefully protect the Debtor's interests in:
 - Assets
 - Income
 - Fresh start

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The Law of Chapter 13: Reconciling and Unifying the Interest of Debtors, Creditors, and the Nation's Economic Prosperity

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Chapter 13 Creditor's Counsel JUSTICE

- Extract the uttermost farthing
- Advocate Debtor's accountability
- Advocate Creditor's repayment
- Enforce the law against the Debtor

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Just One More Meaning of Our Nation's Motto: E Pluribus Unum/OUT OF MANY ONE

And perhaps not coincidentally, the motto that appears on all US coinage.



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Chapter 13 Creditor's Counsel MERCY

- Accept plan modifications so debtor can continue with payments & retain collateral
- Balance plan repayment against repo of collateral
- Weigh long term economic gain over short term economic gain
- Weigh rehabilitation of a customer, entrepreneur, or a family

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Life's Lessons from the Law: Personal Characteristics

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An arrogant lawyer is a loaded revolver, a humble lawyer is a problem solver.

- Pride obscures judgment and weakens our ability to listen, analyze and assess.
- Humility sharpens our observations, strengthens our judgment and gets our egos out of the way.
- “The...qualities which I am groping to characterize are...what compendiously might be called dominating humility.”
Justice Felix Frankfurter

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Prompt disclosure is often the best disinfectant.

- Prompt disclosure of your shortcomings to your client minimizes the risk of being sued.
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A lawyer's rhetoric is more likely to impress herself than anybody else.

- It just sounds so clever when we say it ourselves.
- But lucidity trumps loquacity.
- And joke-telling is dangerous: The safest joke to tell is the one on you.

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Fiduciary Duty is easier to offend than it is to define

- Courts have 20-20 hindsight
- A “punctilio of an honor most sensitive”?!
▪You and yours vs me and my fee
- Are you practicing law or is your paralegal?
- When in doubt, be your better self

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Exceptional preparation beats exceptional intellect.

- Good lawyering is earned not bequeathed.

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Human justice is imperfect justice

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A lawyer's fear of leaving a dollar on the table usually costs his client more than a dollar.

- As a result, to measure your success by your opponent's failure is a double-negative: hers and yours.

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Lawyers are an insecure lot

- either their practice is too busy and they fear malpractice or too slow and they fear unemployment.
- A law practice breeds insecurity because outcomes and opportunities are sometimes hard to predict.

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The Constitution and the law only recite our rights and freedoms; the lawyer earns them

- Constitutional and legal rights are not self-executing.
- We must often earn the benefits of the Constitution and the law for our clients.

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Scheduling a law practice is as difficult as scheduling the weather; it is going to snow you in at the wrong time.

- Since you can't change the weather, enjoy it. Being snowed in can be pretty, and pretty exciting.

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A lawyer who files a responsive pleading a day early is a lawyer who miscounted.

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Practicing law is like fasting: it can be good for the soul-until it kills you

- Balance is the point. Avoid too much of a good thing.

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