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Don't Mess with Texas (or Ethics): Avoiding Unanticipated Landmines and Pitfalls

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20 Judge Table Leaders

HYPOTHETICAL #1

In a bankruptcy case, counsel representing a debtor, who is a parent of a child abuse victim in an adversary proceeding against the child's teacher and school, drafted a motion for summary judgment using ChatGPT.

The holdings in several cases cited by counsel were inaccurate, and the purported facts were unsupported by the record. Defense counsel filed a scathing response. While the parties were briefing the summary judgment motion and response, defense counsel turned to social media to vent his frustrations. Among other things, he criticized debtor's counsel, criticized the judge, included the judge's email address in posts, and discussed material facts of the matter. Debtor's counsel responded on social media, calling defense counsel a liar and also discussing material facts of the matter. This led to a barrage of social media posts by non-parties taking sides, one of whom posted the name and home address of a critical witness and called the judge soft on child abuse.

A senior partner in debtor's special counsel's firm discovers all of this. What should he do?

DISCUSSION AND RELEVANT MATERIALS

1. Ethics Rules Governing Use of Technology

Social media, Zoom, automated document review and management technology, artificial intelligence ("AI"), and other digital platforms provide opportunities to improve efficiency, reduce costs, and enhance productivity in law offices. A recent study by McKinsey & Co. estimated that as much as 23% of an average lawyer's work can be automated.[1] As with any technology, however, technology can pose both risks and ethical dilemmas.

a. Model Rule[2]

ABA Model Rule of Professional Conduct 1.1 (Competence) states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[3]
>
> Model Rule 1.1 cmt. 8 provides: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[4]

b. A Comment on Comment 8

> One district court put the following spin on comment 8 to the model rule in connection with electronically stored information ("ESI"): "The Court pauses here for a moment to calm down litigators less familiar with ESI. (You know who you are.) In life, there are many things to be scared of, including, but not limited to, spiders, sharks, and clowns—definitely clowns, even Fizbo.[5] ESI is not something to be scared of. The same is true for all the terms and jargon related to ESI. Discovery of ESI is still discovery, governed by the same Federal Rules of Civil Procedure as all other civil discovery. . . . Having said that, the ethical rules now require attorneys to be competent with technologies such as ESI." *City of Rockford v. Mallinckrodt ARD Inc*., 326 F.R.D.

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[1] Abigail Johnson Hess, *Experts say 23% of lawyers' work can be automated—law schools are trying to stay ahead of the curve*, CNBC (Feb. 18, 2020, 5:13 AM), https://www.cnbc.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html).

[2] All Model Rules of Professional Conduct can be found at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.

[3] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

[4] MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2023).

[5] "Fizbo" apparently refers to an episode of the television show *Modern Family* in which the character Cameron breaks out his favorite clown costume to make Luke's birthday party a hit. Cameron's clown persona is called Fizbo. *Modern Family: Fizbo* (ABC television broadcast Nov. 25, 2009). *See* https://modernfamily.fandom.com/wiki/Fizbo.

489, 492 n.2 (N.D. Ill. 2018) (internal citation omitted) (citing comment 8 to Model Rule 1.1).

c. Documenting and Preserving ESI

In another case, the district court awarded sanctions for discovery violations in a trademark infringement action under the Lanham Act. In an early conference, the court had warned the parties to preserve ESI. The defendant in the case failed to timely produce relevant emails, claiming errors and a misunderstanding of how to document and preserve ESI. Also, there evidently was no effort to interview the defendant's document custodian. The district court imposed sanctions, including payment of attorneys fees and an order barring the defendant from relying on evidence that had not been timely produced. Citing comment 8, the district court observed:

> The attorneys have an obligation to investigate their clients' information management system thoroughly to locate potentially relevant and discoverable material, no matter how technically opaque that information system may appear. *Such an investigation goes well beyond simply asking the client for the relevant files and trusting that the client itself has a complete understanding of its own information technology structure.*

DR Distributors, LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839, 927 (N.D. Ill. 2021) (quoting Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 Fed. Cts. L. Rev. 2, 3–4 (2000)).

2. Pitfalls to the Use of Social Media

Social media has quickly become a powerful tool in law practice. It has allowed lawyers to become more proficient in legal marketing, stay abreast of current affairs, and research cases. However, like technology in general, the infusion of social media into modern legal practice comes with significant ethical considerations, including protection of confidential information and the attorney-client privilege, impartiality and decorum of the tribunal, trial publicity, and communication with people represented and unrepresented by counsel.

a. Model Rules

ABA Model Rule 1.6(a) (Confidentiality of Information) provides that:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).[6]

Model Rule 1.6(c) states:

[6] MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2023).

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[7]

In 2018, the ABA Standing Committee on Ethics and Professional Responsibility addressed Model Rule 1.6 in the context of lawyers who blog. In Formal Opinion 480, the committee concluded that "[l]awyers who blog or engage in other public commentary may not reveal information relating to a representation that is protected by Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the Model Rules." FO 480 also addresses related ethical issues with blogging, including trial publicity. With respect to arguments that lawyer blogging and online commentary are protected by the First Amendment, the committee did not formally opine but noted that courts have held that a lawyer's free speech rights are often limited when a lawyer acts in a representative capacity.[8]

Model Rule 3.5 (Impartiality & Decorum of the Tribunal) provides that:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.[9]

Model Rule 3.6 (Trial Publicity) states that:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

[7] MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2023).
[8] ABA Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018).
[9] MODEL RULES OF PRO. CONDUCT r. 3.5 (AM. BAR ASS'N 2023).

* * *

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).[10]

Model Rule 4.2 (Communication with Person Represented by Counsel) provides that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[11]

Model Rule 4.3 (Dealing with Unrepresented Person) provides that:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.[12]

Model Rule 8.2(a) (Judicial and Legal Officials) states:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.[13]

b. Johnny Depp/Amber Heard Trial

The divorce of Johnny Depp and Amber Heard made headlines in 2016 and 2017 when Heard accused Depp of domestic violence and abuse in media interviews. Depp sued and lost a United Kingdom libel lawsuit but later won a United States defamation

[10] MODEL RULES OF PRO. CONDUCT r. 3.6 (AM. BAR ASS'N 2023).
[11] MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2023).
[12] MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 2023).
[13] MODEL RULES OF PRO. CONDUCT r. 8.2 (AM. BAR ASS'N 2023).

lawsuit against Heard. The case was heavily covered on social media. The *Washington Post* observed that the "hashtag #justiceforjohnnydepp has received nearly 7 billion views across TikTok and regularly trends on Twitter, as fans create supercuts from trial footage which are edited to make Heard's accusations seem unfounded."[14] Heard's lawyers asserted in media interviews that Depp's legal team was responsible for the negative social media coverage and that social media influenced the trial outcome.[15] However, Depp's team maintains that social media played no role in the verdict. Moreover, a juror came forward to say that the jury decisions were guided by evidence, not by social media.[16] In the end, it is unclear what role Depp's lawyers played with respect to the social media campaign. Is such a social media campaign permissible under Rule 3.6 (Trial Publicity)? Or does it pose a problem under Rule 3.5(a): "A lawyer shall not . . . seek to influence a judge, juror, prospective juror or other official by means prohibited by law"?

The Depp/Heard litigation involved allegations that Depp's legal team orchestrated a social media campaign and that the campaign was successful in swaying the jury. What if a social media campaign backfires and harms the lawyer's client? For example, an Illinois lawyer posted a YouTube video—without his client's permission—because he believed that the video showed police planting drugs on his client. In fact, the video showed his client *delivering* drugs to the buyer. The client eventually agreed to plead guilty after prosecutors obtained the video. According to Illinois disciplinary authorities, the defense lawyer "published damning evidence on the Internet with little to no thought or discussion of the possible consequences to his client," and these actions "threatened the fairness of a criminal proceeding and harmed his client."[17] The lawyer was suspended for five months.[18]

c. Adverse Effects of Social Media Posting

Social media postings by the client can also backfire. In *Lenz v. Universal Music Corp.*,[19] Universal Music Corp. sent a "takedown notice" to YouTube alleging that a 29-second home video that Lenz posted of her toddler dancing to the Prince song "Let's Go Crazy" infringed Universal's copyright, and YouTube removed the video. Lenz argued that her use of the video was "fair use." As described by the court, "[p]rior to and during the litigation, Lenz made comments in emails and electronic 'chats' with friends, postings on her blog, and statements to reporters, in which she discussed

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[14] Emily Yahr & Travis M. Andrews, *Among his biggest fans, Johnny Depp has already won his case*, WASH. POST (May 4, 2022, 6:00 AM), https://www.washingtonpost.com/arts-entertainment/2022/05/04/depp-heard-trial-fans-devotion/.

[15] Elizabeth Blair & Ayana Archie, *Amber Heard says social media was a factor for her defamation trial jury*, NPR (June 15, 2022, 5:00 AM), https://www.npr.org/2022/06/15/1104925752/amber-heard-says-social-media-was-a-factor-for-her-defamation-trial-jury.

[16] *Id.*

[17] Debra Cassens Weiss, *Lawyer suspended for posting video of undercover drug buy in mistaken belief it exonerated client*, ABA J. (Mar. 19, 2014, 4:45 PM), http://www.abajournal.com/news/article/lawyer_suspended_for_posting_video_of_undercover_drug_buy_in_mistaken_belie.

[18] *Id.*

[19] Case No. 5:07-cv-03783 JF (PVT), 2010 WL 4789099 (N.D. Cal. Nov. 17, 2010).

conversations she had with her counsel."[20] Not surprisingly, Universal moved to compel production of any evidence relating to Lenz' conversations with her counsel. Universal argued that Lenz had waived the attorney-client privilege by disclosing the conversations to third parties over the internet. The court agreed. According to the court, "[w]hen a client reveals to a third party that something is 'what my lawyer thinks,' she cannot avoid discovery on the basis that the communication was confidential."[21] This case emphasizes the need for lawyers to counsel social media-savvy clients as to the downside of social media use during litigation and, in particular, the danger that social media posting can result in the waiver of a privilege.

d. "Scrubbing" Content from Social Media Accounts

Can lawyers advise clients to "scrub" unfavorable photographs or other content from their social media accounts? One state ethics opinion provides that lawyers cannot advise clients to "scrub" their social media accounts. "A lawyer may instruct a client to make information on the social media website 'private,' but may not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists."[22] But when does such information "no longer exist"? Another state ethics opinion observed that, even when a social media post is removed, "the substance of the posting is generally preserved in cyberspace or on the user's computer." [23] Accordingly, this ethics opinion observed that a lawyer can advise a client to scrub his or her social media account as long as "such removal does not violate the substantive law regarding the destruction or spoliation of evidence."[24]

e. "Friending" a Judge on Social Media

What about "friending" a judge on social media? Model Rule 3.5 prohibits most ex parte contacts between lawyers and judges. However, with respect to federal judges, the Code of Conduct for United States Judges may come into play. Canon 2 of the Code is titled: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." Canon 2B specifically provides that a "judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment."[25] Canon 3A(4) states that "a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers."[26]

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[20] *Id.* at *1.

[21] *Id.* at *5.

[22] Phila. Bar Ass'n Pro. Guidance Comm., Op. 2014-5, at 1 (July 2014), https://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-5Final.pdf.

[23] James M. Wicks, *Social Media Ethics Guidelines*, 2015 N.Y. STATE BAR ASS'N (2015), at 19, https://nysba.org/app/uploads/2020/02/Final-2015-ComFed-Social-Media-Ethics-Guidelines-00066736@x9DDAB. pdf (stating that "there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer.").

[24] *Id.*

[25] Code of Conduct for United States Judges, Canon 2B.

[26] Code of Conduct for United States Judges, Canon 3A(4).

As far as merely "friending" a judge, however, there seems to be a split of authority. A New York ethics opinion appears to allow New York state judges and attorneys to add each other as "friends" on social media sites.[27] On the other hand, a Florida ethics opinion concludes that judges may not friend lawyers on social media.[28] An advisory opinion from the Committee on Codes of Conduct with respect to the federal canon seems to take a dim view of social media interaction:

> Another example of social media activity that raises concerns under Canon 2 is the exchange of frequent messages, "wall posts," or "tweets" between a judge or judicial employee and a "friend" on a social network who is also counsel in a case pending before the court. In the Committee's view, social media exchanges need not directly concern litigation to raise an appearance of impropriety issue; rather, any frequent interaction between a judge or judicial employee and a lawyer who appears before the court may "put into question the propriety of the judicial employee's conduct in carrying out the duties of the office." Employees' Code, Canon 2. With respect to judges, communication of this nature may "convey or permit others to convey the impression that they are in a special position to influence the judge." Judges' Code, Canon 2B. A similar concern arises where a judge or judicial employee uses social media to comment—favorably or unfavorably—about the competence of a particular law firm or attorney. Of course, any comment or exchange between an attorney and the judge must also be scrutinized so as not to constitute an ex parte communication.[29]

f. "Blogging" About Judges

Lawyers have also gotten into trouble by "blogging" about judges. In *Florida Bar v. Conway*,[30] a Florida attorney took issue with the practice of a state court judge scheduling early trials to force criminal defendants to seek a continuance and, as a result, waive speedy trial deadlines. The lawyer unsuccessfully sought to change the judge's practice by filing a complaint with the judicial supervising authority. When that failed, the lawyer "blogged" his complaint, describing the judge as an "evil, unfair witch," "seemingly mentally ill," and "clearly unfit for her position and someone who does not know "what it means to be a neutral arbiter." The Florida Supreme Court concluded that the lawyer's blog entries violated the Florida state equivalent of Model Rule 8.2: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."[31] The court issued a public reprimand.

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[27] N.Y. Jud. Ethics Comm., Informal Op. 08-176 (2009).

[28] Fla. Jud. Ethics Advisory Comm., Formal Op. No. 2009-20 (2009).

[29] Guide to Judiciary Policy, Vol. 2, Part B, Ch. 2, 225-26, https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

[30] 996 So. 2d 213 (Fla. 2008).

[31] MODEL RULES OF PRO. CONDUCT r. 8.2 (AM. BAR ASS'N 2023).

g. Using Social Media to Research Potential Jurors

Lawyers have also turned to social media to conduct research on potential jurors during voir dire. Again, the case law and opinions are not consistent as to this use of technology. A 2014 survey of federal judges by the Federal Judicial Center found that approximately 26% of the respondents admitted that they banned attorneys from using social media during voir dire.[32] Another 70% of respondents had never addressed the question with lawyers and, therefore, had never taken a position.[33] At least one court has suggested that social media research of potential jurors prior to voir dire may be an affirmative obligation.[34]

Communication with potential jurors implicates Model Rule 3.5(b), which prohibits ex parte communications with, *inter alia*, jurors. Such communication may also implicate Model Rule 4.3 (Dealing with Unrepresented Person) The ethics opinions addressing internet research of potential jurors generally draw three distinctions:

1. passive lawyer review of a juror's website or ESM that is available without making an access request, where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review, where the lawyer requests access to the juror's ESM; and

3. passive lawyer review, where the juror becomes aware through a website or ESM feature of the identity of the viewer[.][35]

In Formal Opinion 466, the ABA's Standing Committee on Ethics and Professional Responsibility concluded that "a lawyer may passively review a juror's public presence on the Internet, *but may not communicate with a juror*."[36] The opinion found that "[r]equesting access to a private area on a juror's ESM is communication within this framework."[37] In other words, the opinion would preclude a lawyer from sending a "friend request" to a prospective juror. However, if there is no such active engagement but the potential juror learns that "the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review[,] [this] does not constitute a communication from the lawyer in violation of Rule 3.5(b)."[38]

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[32] Meghan Dunn, *Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management*, FED. JUD. CTR, May 1, 2014, at 13. *See* https://www.fjc.gov/content/jurors-and-attorneys-use-social-media-during-voir-dire-trials-and-deliberations-report.

[33] *Id.*

[34] *Johnson v. McCullough,* 306 S.W.3d 551, 554 (Mo. 2010) ("a party *must* use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial") (emphasis added) (internal citation omitted)).

[35] ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014).

[36] *Id.* at 9 (emphasis added).

[37] *Id.*

[38] *Id.*

h. Unprofessional and Abusive Behavior Toward Opposing Counsel, Parties, and the Court

In *Krim v. First City Bancorporation of Texas, Inc.* (*In re First City Bancorporation of Texas, Inc.*),[39] the Fifth Circuit affirmed a sanction levied by the bankruptcy court on Harvey Greenfield, counsel for a class suing First City Bancorporation of Texas. Greenfield's class agreed to a $20 million dollar settlement of their claims. The settlement was ultimately vacated when federal regulators seized control of First City's assets. First City then filed a bankruptcy petition under chapter 11. The Fifth Circuit's opinion on the matter succinctly describes Greenfield's behavior in front of the bankruptcy court:

- He characterized other attorneys, including an Assistant United States Attorney, as (1) a "stooge"; (2) a "puppet"; (3) a "weak pussyfooting 'deadhead'" who "had been 'dead' mentally for ten years"; (4) "various incompetents"; (5) "inept"; (6) "clunks"; (7) "falling all over themselves, and wasting endless hours"; (8) "a bunch of starving slobs"; and (9) an "underling who graduated from a 29th-tier law school."

- He called the chairman of First City a "hayseed" and a "washed-up has been," and he also called other First City directors "scoundrels."

- He referred to one law firm, Carrington, Coleman, Sloman & Blumenthal, L.L.P., as "stooges" of another law firm, Vinson & Elkins, L.L.P.

- He referred to the work of other attorneys as "garbage" that demonstrated "legal incompetence" while involving "ludicrous additional time and expense."

- He asserted that Vinson & Elkins was using First City as a "private piggybank."

- He described an executive compensation plan approved by the bankruptcy court as a "bribe."[40]

The Fifth Circuit was equally offended by Greenfield's explanation for his outbursts: "Unremorsefully and brazenly, Greenfield contends that his egregious behavior serves him well in settlement negotiations and is therefore appropriate."[41] The bankruptcy court imposed a monetary sanction of $22,500 (later increased by $2,500) and barred Greenfield from practicing in the bankruptcy courts of the Northern District of Texas

[39] 282 F.3d 864 (5th Cir. 2002).
[40] *Id.* at 866 (internal quotations omitted).
[41] *Id.* at 865.

unless he first obtained written permission from the court. The bankruptcy court ultimately vacated its "bar" order from the sanction. The Fifth Circuit affirmed.

In *Geltzer v. Ng* (*In re Ng*),[42] the bankruptcy court addressed a sanctions motion filed by the chapter 7 trustee. The trustee sought sanctions against a lawyer for statements made by the lawyer in a motion to dismiss filed in an adversary proceeding. Those statements included:

> [The trustee] having realized that he has gotten money from the sons, he could extract more, he has begun his extortionist journey again.
>
> [A]s stated earlier, trustee warns to threaten a family into further submission.
>
> They had sued the sons and settled with them. Seeing the promptness of the settlement [the trustee] has to devise ways to reach deeper to extort more settlement.
>
> This [t]rustee . . . has been known to never file an estate closure report[] on an expeditious basis but for keeping it open. Why? Unexpected [a]ccretion!
>
> [The trustee] brought a lawsuit against the sons of the debtors . . . on grounds very frivolous. This settlement[] became a source of inspiration to [the trustee] to dig more.[43]

The bankruptcy court declined to sanction the attorney, finding that "the [t]rustee ha[d] not established by clear evidence that [the lawyer] acted in bad faith in employing such strident words or that his conduct was entirely meritless and undertaken for improper purposes"; the court further found that the statements in question "[were] more accurately viewed as rhetorical flourishes than as knowing and material statements that [were] false."[44]

3. Disclosure of Confidential/Privileged Material

One of the powerful benefits of digital media and the internet is the ability to exchange and communicate information rapidly and efficiently. This speed and efficiency, however, can also lead to inadvertent disclosure of confidential or privileged information. Lawyers have an obligation to protect confidential client information under the Model Rules. Trustees also have an obligation to protect against the disclosure of the debtor's tax records and personally identifiable information.[45]

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[42] 584 B.R. 463, 471–72 (Bankr. E.D.N.Y. 2018).

[43] *Id.* at 467.

[44] *Id.* at 468 (quoting *Geltzer v. Brizinova (In re Brizinova)*, 565 B.R. 488 (Bankr. E.D.N.Y. 2017).

[45] "The trustee shall create and maintain a system to ensure that debtor tax returns that are not destroyed immediately after the meeting of creditors are maintained no longer than provided in this policy, and that the tax

a. Model Rules

ABA Model Rule 1.6(a) (Confidentiality of Information) provides that:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).[46]

Model Rule 1.6(c) provides:

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[47]

b. Use of Cloud Storage Services

While using cloud storage services can be a fast and efficient way to store and retrieve documents, such use can also pose a danger of inadvertently disclosing confidential or privileged documents. The New York State Bar Association's Committee on Professional Ethics concluded that a lawyer's use of online data storage to preserve client data is ethically permissible if the lawyer exercises reasonable care to (1) ensure that the system is secure and (2) ensure that client confidentiality is maintained.[48] The Professional Ethics Committee of the Florida Bar permits lawyers to use cloud storage service if the lawyers:

- take reasonable precautions to maintain the confidentiality of the client's information;
- take reasonable precautions to ensure that the service provider maintains adequate security, including researching the provider; and
- have adequate access to the information stored remotely.[49]

c. Disclosure Risks in Connection with the Use of Social Media

returns are handled in such a way as to protect a debtor's privacy to the extent reasonably possible." *Handbook for Chapter 7 Trustees*, at 5-22; "Information that is not generally considered [Personally Identifiable Information] because it is shared by many people includes: first or last name, if common (like Smith or Jones); country, state or city of residence; age (especially if not specific); gender or race; name of school a person attends or workplace; and grades, salary, or job position. However, since this information could be used to identify a person when multiple pieces of it are brought together, even non-PII data such as this should be protected from loss." *Id*. at 5-23.

[46] MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2023).

[47] MODEL RULES OF PRO. CONDUCT r. 1.6(c) (AM. BAR ASS'N 2023).

[48] N.Y. State Bar Ass'n Comm. on Pro. Ethics, Ethics Op. 842 (2010).

[49] Fla. Bar Pro. Ethics Comm., Ethics Op. 12-3 (2013).

Use of social media also poses disclosure risks. In *In re Skinner*,[50] a client submitted negative reviews about his former lawyer to multiple consumer websites after firing the lawyer. In response, the lawyer posted confidential and privileged information about the former client. The Georgia Supreme Court ruled that the lawyer's actions violated Rule 1.6 of the Georgia Rules of Professional Conduct (which is based on ABA Model Rule 1.6) and issued a public reprimand.

d. Posting Negative Comments on Listservs

In re Quillinan[51]serves as a warning to lawyers about using professional "listservs" to complain about difficult clients. In that case, a lawyer posted negative comments about a former client on the listserv for the Oregon State Bar's Workers Compensation Section. The post included confidential personal and medical information about the former client. The post warned that the former client was "difficult" and that she was "attorney shopping" because she was unwilling to accept a "very fair" settlement offer. The Oregon Supreme Court found that the lawyer had violated Rule 1.6 by disclosing this confidential information and that none of the exceptions to the rule applied. The court issued a ninety-day suspension.

e. Intentional Disclosure of Information Subject to a Protective Order

In *In re Roman Catholic Church for Archdiocese of New Orleans*,[52] the bankruptcy court encountered a remarkable case of a lawyer disclosing highly sensitive information that had been the subject of a protective order entered by the court. The case involved the bankruptcy of the Archdiocese of New Orleans. During discovery, the parties had access to highly sensitive and confidential information pertaining to alleged acts of sexual abuse by priests. Accordingly, disclosure of this information was restricted by a protective order. On January 20, 2022, counsel for the Archdiocese of New Orleans filed a motion claiming that information covered by the protective order—including "the identity of a priest, details of sexual abuse allegations made against that priest and the individual who alleged the abuse, and the resolution of the subsequent Archdiocesan investigation"—was disclosed to officials at a local high school where the accused priest had been serving as a chaplain.[53] Following an investigation by the United States trustee, the bankruptcy court concluded that the information was "leaked" by counsel for a group of abuse victims represented on the unsecured creditors' committee. The bankruptcy court sanctioned that attorney $400,000. The bankruptcy court's sanction was affirmed by the district court.[54]

4. Impact of AI Platforms in the Practice of Law—ChatGPT

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[50] 758 S.E.2d 788 (Ga. 2014).

[51] 20 DB Rprt 288 (Or. 2006).

[52] No. 20-10846, 2022 WL 7204872 (Bankr. E.D. La. Oct. 11, 2022).

[53] *Id.* at *3.

[54] *In re Roman Cath. Church of Archdiocese of New Orleans*, Case No. 22-1740 c/w 22-4101, 2023 WL 2644345, at *1 (E.D. La. Mar. 27, 2023). *See also In re Roman Cath. Church of Archdiocese of New Orleans*, Case No. 22-1740 c/w 22-4101, 2023 WL 4105655 (E.D. La. June 21, 2023).

The term "artificial intelligence" or, simply, "AI" refers to computer systems that can perform tasks that typically require human intelligence, such as learning, reasoning, perception, and decision-making. AI systems can be programmed to analyze large amounts of data, recognize patterns, and make predictions or decisions based on that analysis. It is this aspect of AI that promises to offer significant benefits to the practice of law, including automating repetitive tasks, increasing accuracy and speed, providing cost savings, and even enhancing cybersecurity.[55] ChatGPT adds another layer to this potential benefit. ChatGPT is an AI platform designed by OpenAI. Based on the natural language prompts provided by the user, the platform can answer questions, write copy, draft emails, and even hold a conversation.[56] In other words, ChatGPT can be used to answer legal questions from a prompt and also draft pleadings.

a. Model Rules

Lawyers who use ChatGPT and other AI platforms may risk inadvertent disclosure of client confidences to the extent that they allow these platforms to access confidential information. This implicates Model Rule 1.6 (cited above). Other Model Rules implicated:

Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance) provides that:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

[55] *7 ways artificial intelligence can benefit your law firm*, ABA (Sept. 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/september-2017/7-ways-artificial-intelligence-can-benefit-your-law-firm/; Amanda Robert, *How can lawyers use AI to improve their practice?*, ABA J. (Mar. 3, 2023, 12:37 PM), https://www.abajournal.com/web/article/how-can-lawyers-use-ai-to-improve-their-practice; Nicole Black, *The Case for ChatGPT: Why lawyers should embrace AI*, ABA J. (Feb. 21, 2023, 1:11 PM), https://www.abajournal. com/columns/article/the-case-for-chatgpt-why-lawyers-should-embrace-ai.

[56] Kevin Roose, *The Brilliance and Weirdness of ChatGPT*, N.Y. TIMES (Dec. 5, 2022), https://www.nytimes.com/ 2022/12/05/technology/chatgpt-ai-twitter.html.

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[57]

Model Rule 1.3 (Diligence) states:

A lawyer shall act with reasonable diligence and promptness in representing a client.[58]

Model Rule 1.1 (Competence) provides that:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[59]

b. "Bogus" Case Cites Generated by ChatGPT

In *Mata v. Avianca, Inc.*,[60] plaintiff's counsel, Steven Schwartz, filed an opposition to a motion to dismiss and used ChatGPT to assist in drafting the opposition brief. The brief contained citations to at least six non-existent (or in the words of the district court "bogus") cases: *Varghese v. China Southern Airlines Co. Ltd.*, 925 F.3d 1339 (11th Cir. 2019); *Shaboon v. Egyptair*, 2013 IL App (1st) 111279-U (Ill. App. Ct. 2013); *Peterson v. Iran Air*, 905 F. Supp. 2d 121 (D.D.C. 2012); *Martinez v. Delta Airlines, Inc.*, 2019 WL 4639462 (Tex. App. Sept. 25, 2019); *Estate of Durden v. KLM Royal Dutch Airlines*, 2017 WL 2418825 (Ga. Ct. App. June 5, 2017); and *Miller v. United Airlines, Inc.*, 174 F.3d 366 (2d Cir. 1999).[61] When the district court could not locate the cases cited, it ordered plaintiff's counsel to submit an affidavit attaching copies of the opinions. Plaintiff's counsel complied and filed copies of the bogus opinions. It is unclear from the court documents, but Schwartz apparently used ChatGPT to "pull" the opinions. Again, the opinions sent to the court were bogus. The district court also noted that one of the bogus opinions, *Varghese v. China South Airlines Ltd.*, in turn, cited multiple additional bogus cases. Schwartz responded with a new affidavit admitting that the case cites were fictional and that he had relied on ChatGPT without checking the cites. According to Schwartz, he "greatly regret[ed] having utilized generative artificial intelligence to supplement the legal research performed herein" and would never do so in the future without absolute verification of its authenticity.[62] The court's sanctions decision is still pending.

c. Required Certification Regarding Generative AI

[57] MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2023).
[58] MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2023).
[59] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).
[60] Case No. 22-cv-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023).
[61] *Id.* at *1, 3.
[62] *Id.* at *9.

In response to the *Mata v. Avianca* fiasco, U.S. District Judge Brantley Starr of the Northern District of Texas added the following certification requirement to his list of "judge-specific" rules:

> **Mandatory Certification Regarding Generative Artificial Intelligence**
>
> All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being. These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.

In an interview, Judge Starr explained that "[w]e're at least putting lawyers on notice, who might not otherwise be on notice, that they can't just trust those databases. They've got to actually verify it themselves through a traditional database."[63]

[63] Jacqueline Thomsen, *US judge orders lawyers to sign AI pledge, warning chatbots 'make stuff up*,' REUTERS (June 2, 2023 12: 17 PM), https://www.reuters.com/legal/transactional/us-judge-orders-lawyers-sign-ai-pledge-warning-they-make-stuff-up-2023-05-31/.

d. In January 2023, SCOTUSblog tested ChatGPT with a list of fifty questions about the U.S. Supreme Court.[64] According to SCOTUSblog, these questions "covered a range of topics: important rulings, justices past and present, history, procedure, and legal doctrine." SCOTUSblog concluded that the platform answered only twenty-one of the fifty questions correctly, but in the case of three of the "correct" answers, ChatGPT's answers "were literally true but struck us as incomplete or potentially misleading." Examples of errors cited by SCOTUSblog included:

- "When we asked it how many justices President Donald Trump appointed (Question #35), it confidently asserted the answer was two: Neil Gorsuch and Brett Kavanaugh," ignoring the confirmation of Amy Coney Barrett.[65]

- "When we asked it to name three noteworthy opinions of Justice Ruth Bader Ginsburg (Question #11), it started off strong: It identified (and correctly summarized) her majority opinion in *United States v. Virginia* and her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*. But then, oddly, it claimed she wrote a dissent in *Obergefell v. Hodges*, the landmark decision that declared a constitutional right to same-sex marriage. Ginsburg, according to ChatGPT, 'argued that the Court should have left the issue of same-sex marriage to the states.' Ginsburg, of course, did no such thing. She was in the majority in *Obergefell*." [66]

- "When we asked it about the responsibilities of the court's junior justice (Question #45), the bot came up with 'maintaining the Court's grounds and building,' which sounds like an even worse hazing ritual than the actual answer (taking notes during the justices' private conferences and serving on the 'cafeteria committee')." [67]

- "When we asked it about impeachment (Question #49), it knew that Justice Samuel Chase was impeached by the House in 1804 and it even knew that Chase was not removed by the Senate. But then it claimed that Justice 'James F. West' was impeached in 1933. Nobody was impeached in 1933, and there has never even been a justice named James F. West." [68]

[64] James Romoser, *No, Ruth Bader Ginsburg did not dissent in* Obergefell*—and other things ChatGPT gets wrong about the Supreme Court*, SCOTUSblog (Jan. 26, 2023, 10:57 AM), https://www.scotusblog.com/2023/01/no-ruth-bader-ginsburg-did-not-dissent-in-obergefell-and-other-things-chatgpt-gets-wrong-about-the-supreme-court/.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

HYPOTHETICAL #2

BankruptcyRUs (BKRUS) pops up in browser inquiries about bankruptcy. BKRUS promises representation by experienced local bankruptcy partners for a $1,500 fee to people who complete a questionnaire.

Ms. Debtor, a South Carolina resident, saw this BKRUS ad. She called and was promised representation by experienced local bankruptcy partners for a $1,500 fee. She completed and emailed to BKRUS the questionnaire provided on its website. Ms. Debtor is recently divorced and has total debts that potentially make her ineligible to file for chapter 13 relief. Those debts include unpaid income taxes jointly owed by her and her ex-husband but based entirely on her ex-husband's income.

BKRUS sent a completed draft chapter 7 petition, schedules, a Statement of Financial Affairs ("SOFA"), and a statement of intention to Attorney Rookie in South Carolina, who has a fee sharing arrangement with BKRUS. Ms. Debtor called Attorney Rookie and asked if she should file bankruptcy. Attorney Rookie, a new lawyer with only a little chapter 13 experience, advised Ms. Debtor to file chapter 13, increased the fee to her district's $3,500 "no look" fee, and informed Ms. Debtor that the fee could be paid under the plan. Ms. Debtor verbally agreed to the filing on a phone call. Three months later, Attorney Rookie, an overwhelmed sole practitioner, filed the case without making any changes to the documents prepared by BKRUS other than to change the chapter from 7 to 13. The schedules and SOFA contained numerous errors, and Attorney Rookie did not disclose to the court her fee sharing arrangement with BKRUS.

At the 341 meeting of creditors, Ms. Debtor's ineligibility for chapter 13 became evident. When a possible subchapter V conversion was raised, Attorney Rookie quickly agreed, not wanting to reveal her lack of experience and expertise. She promptly converted the case to chapter 11 and elected subchapter V, but then she let the case sit dormant for a few months. Eventually, without any prior discussions with the subchapter V trustee, the IRS, or other parties in interest, Attorney Rookie filed a form plan she found online that assumed a nonconsensual confirmation.

Identify Attorney Rookie's mistakes.

DISCUSSION AND RELEVANT MATERIALS

1. Model Rules

Model Rule 1.3 (Diligence) provides that:

A lawyer shall act with reasonable diligence and promptness in representing a client.[69]

Model Rule 1.1 (Competency) states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[70]

Model Rule 1.4 (Communications) provides as follows:

(a) 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 Rule 1.0(e), 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 that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[71]

Model Rule 1.5 (Fees) states that:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

[69] MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2023).
[70] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).
[71] MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2023).

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

* * *

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.[72]

Model Rule 1.2 (Scope of Representation & Allocation of Authority Between Client & Lawyer) provides that:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with

[72] MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2023).

the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

* * *

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

(d) 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.[73]

Model Rule 1.8 (Current Clients: Specific Rules)

(a) 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 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 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.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.[74]

Model Rule 3.3 (Candor Toward the Tribunal) provides that:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

[73] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2023).
[74] MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 2023).

(2) 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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

* * *

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.[75]

Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

[75] MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2023).

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, the highest court of this jurisdiction.[76]

2. The Case of McClenny, Moseley and Associates PLLC ("MMA")

a. Overview

MMA is a Houston, Texas-based law firm that had specialized in storm damage and hail claims.[77] The leaders of MMA—James McClenny, John Mosley, and R. William

[76] MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2023).

[77] Andrew Strickler, *Houston Storm Firm In Eye Of Louisiana Ethics Hurricane*, LAW360 (Apr. 14, 2023, 4:58 PM), https://www.law360.com/articles/1597119/houston-storm-firm-in-eye-of-louisiana-ethics-hurricane.

Huye—touted their firm's investment in and use of technology, including AI platforms, to identify and enroll clients, file cases, and resolve high volumes of claims quickly and efficiently.[78] Hurricanes Laura, Delta, and Ida subsequently resulted in thousands of claims filed in state and federal court in South Louisiana.[79] MMA opened Louisiana offices and, using its "proprietary technology," filed thousands of hurricane–related claims.[80] MMA alone filed almost 4,000 claims in the United States District Court for the Western District of Louisiana. Indeed, the firm filed 1,600 claims alone in a two- to three-day span in August 2022.[81] In fact, MMA filed so many cases in the Western District that it swamped the court's payment system, which at the time had limited filers to $24,999 in payments for court filings per day.[82] The court subsequently learned that many of these filings included erroneous information. MMA filed cases on behalf of clients naming insurance companies that had no connection with the plaintiffs. The firm also apparently filed cases for plaintiffs who had not authorized the filings and were unaware that a case had been filed on their behalf. In some cases, MMA filed claims on behalf of individuals who had already settled with their insurance companies and received checks. Magistrate Judge Michael North (Eastern District of Louisiana) summarized MMA's activities succinctly in a March ruling suspending the firm: "The record in these cases establishes that [MMA] ha[s] undertaken a brazen, multi-faceted campaign to enrich [itself] with ill-gotten contingency fees paid to [the firm] by unwitting insurance companies ostensibly on behalf of named insureds that they and their firm did not represent."[83]

b. The Marketing Firm

In addition to using AI technology, MMA also apparently employed a marketing firm to round up clients, which may have been a violation of Louisiana law.[84] Court records show that the marketing firm paid $3,500 per potential client, for a total of $14 million.

c. Melvin Addison

In the Western District of Louisiana, one MMA client, Melvin Addison, testified that he was unaware that MMA had filed a case on his behalf and claimed that he never

[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] Alena Maschke, *Houston firm accused of forgery in Lake Charles hurricane insurance lawsuits*, THE ACADIANA ADVOCATE (Dec. 21, 2022), https://www.theadvocate.com/acadiana/news/houston-firm-accused-of-forgery-in-hurricane-insurance-cases/article_b2f02c62-80b3-11ed-a422-2ba02be0bbb7.html [hereinafter *Houston firm accused of forgery*]; Mem. Order, *Stidham v. GeoVera Specialty Ins. Co. (In re McClenny Moseley & Assoc. PLLC)*, No. 2:22-CV-04277-JDC-KK (W.D. La. Aug. 25, 2022), ECF No. 9.
[82] *Stidham*, Case No. 2:22-CV-04277-JDC-KK, ECF No. 9.
[83] Order and Reasons at 1, *Franatovich v. Allied Trust Ins. Co.*, Case No. 2:22-CV-02552 (E.D. La. Mar. 16, 2023), ECF No. 76.
[84] Alena Maschke, *Texas law firm's actions in Louisiana under more scrutiny in federal court*, THE ADVOCATE (Mar. 3, 2023), https://www.theadvocate.com/lake_charles/texas-firms-actions-in-louisiana-under-more-scrutiny/article_194f5cfa-ba0f-11ed-beed-b7a009d93d3e.html [hereinafter *Texas law firm's actions in Louisiana*]; *Franatovich v. Allied Tr. Ins. Co.*, Case No. 2:22-CV-02552, ECF No. 76.

talked to any lawyer at MMA or agreed to MMA filing a case on his behalf.[85] Nevertheless, MMA reached a $89,500 settlement with Addison's insurer, Allstate. Allstate cut a check to Addison and his mortgage holder jointly. Neither Addison nor the mortgage company received any of the funds from the settlement check. Evidence introduced at a disciplinary hearing in the Western District of Louisiana showed that the check had been stamped and cashed by MMA with a note that the firm was acting as "power of attorney" for Addison. Addison claimed that he signed no documents authorizing MMA to take any of these actions.

d. Apex Roofing

Courts investigating MMA also learned that the lawyers in the firm had entered into an arrangement with an Alabama-based roofing company called Apex Roofing.[86] MMA was accused of using Apex to identify and engage clients. Some of these clients thought that they were dealing only with Apex and were unaware that MMA had filed a claim on their behalf.[87] In one case, MMA entered into a settlement with an insurer, deducted its attorney fees from the settlement proceeds, and directed that the remaining amount of $46,000 be turned over to Apex for repairs.[88] The magistrate judge in the Eastern District of Louisiana overseeing the case noted that the amount turned over to Apex far exceeded the cost of the repairs.[89] The judge also noted other instances where Apex was paid out of settlement proceeds but performed no repair work.[90]

e. Consequences

Both the Eastern and Western Districts of Louisiana stayed MMA-filed cases, suspended the firm from filing new cases, and are considering further disciplinary measures.[91]

The Louisiana Department of Insurance entered a "cease and desist" order on February 17, 2023.[92] The department ultimately found that MMA's actions amounted to unfair trade practices in violation of La. R.S. 22:1964 and fined the firm $2 million.[93]

3. The Case of UpRight Law

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[85] *Houston firm accused of forgery*, *supra* note 81; *Stidham*, 2:22-CV-04277-JDC-KK, ECF No. 9.

[86] *Texas law firm's actions in Louisiana*, *supra* note 84; *Franatovich*, Case No. 2:22-CV-02552, ECF No. 76.

[87] Order and Reasons at 8-14, *Franatovich*, Case No. 2:22-CV-02552 ECF. No. 76 (referring to and describing the "Apex scheme").

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Stidham*, Case No. 2:22-CV-04277-JDC-KK, ECF No. 9.

[92] *Id.* at ECF No. 9-3.

[93] News Release, Louisiana Dep't of Ins., Donelon Issues $2 Million in Total Fines to McClenny Moseley & Associates for Massive Insurance Fraud Scheme, (May 2, 2023), https://www.ldi.la.gov/news/press-releases/5-2-23-donelon-issues-2-million-in-total-fines-to-mcclenny-moseley-and-associates-for-massive-insurance-fraud-scheme.

Deighan Law LLC, also known as UpRight Law, LLC, is a Chicago-based law firm that provides bankruptcy services online by contracting with local lawyers across the country. UpRight calls the local lawyers in its network "partners." Nevertheless, it appears that some or all of the work needed to file bankruptcy cases was performed by nonlawyers and lawyers licensed only in the state of Illinois. In *In re Deighan Law LLC*,[94] the bankruptcy court described UpRight's business model:

> Upright Law has a sophisticated internet presence where it provides information to individuals considering a bankruptcy filing. Prospective clients may interface with Upright personnel by telephone or chat through their website. This interaction necessarily involves analysis and the provision of legal advice by staff, the majority of whom are not licensed attorneys and are certainly not Alabama lawyers. The goal is for Upright staff to "onboard" the client, take their information, and populate Best Case bankruptcy forms. A retention agreement is generated and payments are made by the debtors to Upright, in both Chapter 7 and Chapter 13 cases. The decision to file a bankruptcy case, the selection of a chapter under which to file, the preparation of bankruptcy statements, schedules, plans and the like are all the practice of law in Alabama. As such, these functions should be performed by an Alabama lawyer or a properly trained and supervised staff person under the direction of an Alabama lawyer.
>
> Upright then hires an Alabama lawyer to file the bankruptcy case and attend the Section 341 meeting of creditors. Upright contends that its Alabama lawyers are "partners" in Upright Law. These attorneys are advertised on Upright's website as partners of Upright. But[] these attorneys generally have their own separate law practices.[95]

The bankruptcy court ultimately ruled that UpRight violated the Alabama rules of professional conduct by engaging in the unauthorized practice of law.[96] Specifically, the court found that "the Alabama lawyers [affiliated with UpRight] are not true partners and are not regular associates in Upright Law" and that a substantial amount of the work was performed by nonlawyers or lawyers not licensed in Alabama.[97] The court also questioned the quality of the work performed by the lawyers affiliated with UpRight, observing that "Upright Law and the three named Alabama lawyers[] are not practicing law at a level acceptable to the Court."[98] The court noted problems in UpRight's cases, such as inaccurate schedules, erroneous pre-filing counseling certificates, and faulty advice given to debtors.[99] The court awarded sanctions of $500,000 and barred the firm from filing any new cases.[100]

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[94] 637 B.R. 888 (Bankr. M.D. Ala. 2022).
[95] *Id.* at 895.
[96] *Id.* at 922–25.
[97] *Id.* at 922.
[98] *Id.*
[99] *Id.* at 910–22.
[100] *Id.* at 923.

Other courts have also ruled against UpRight and its business model. In *Law Solutions Chicago LLC v. United States Trustee*,[101] the district court notes that the bankruptcy court found that UpRight's business model and its work in the case violated Louisiana's Rules of Professional Conduct, specifically: (1) Rule 1.1 Competence; (2) Rule 1.3 Diligence; (3) Rule 1.4 Communication; (4) Rule 1.5 Fees; and (5) Rule 5.1 Responsibility of Partners, Managers, and Supervisory Lawyers.[102] The court noted that UpRight initially assigned the debtor a Tennessee lawyer who was not licensed to practice in Louisiana. The firm then reassigned the debtor to a Louisiana lawyer who was located over 350 miles from the debtor's residence. The court noted that the debtor was never sent a retention agreement from a Louisiana lawyer and that the retention agreement sent to the debtor violated the Louisiana Rules of Professional Conduct.

Courts, however, have not uniformly rejected UpRight's business model. In *In re Richard*, the bankruptcy court found that each of the local attorneys affiliated with UpRight "has contracted with separate entity, UpRight Law, to share fees in violation of Bankruptcy Code Section 504."[103] Section 504(b)(1) provides that a "member, partner, or regular associate in a professional association, corporation, or partnership may share compensation or reimbursement received under section 503(b)(2) or 503(b)(4) of this title with another member, partner, or regular associate in such association, corporation, or partnership, and may share in any compensation or reimbursement received under such sections by another member, partner, or regular associate in such association, corporation, or partnership."[104]

On appeal, however, the district court reversed the bankruptcy court.[105] The district court noted that UpRight characterized its local partners as members of the firm, that the parties entered into partnership agreements, and that UpRight shared information with its local partners. The court concluded that UpRight and its local partners "present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm" and that they could therefore share compensation under section 504(b)(1).[106] The district court's analysis, however, was limited to section 504. There was very little analysis of the state's rules of professional conduct, nor was there any discussion of the competency-related issues addressed by other courts.

4. Timing Considerations

In the hypothetical, the debtor's lawyer delayed filing her case by three months and then failed to update the debtor's schedules. Delays in filing a bankruptcy case can have serious consequences for the debtor and implicate the model rules governing competency and diligence. A number of cases have addressed UpRight Law's practice of allowing debtors

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[101] 592 B.R. 624, 628 (W.D. La. 2018), *aff'd sub nom. Law Sols. Chi., L.L.C. v. United States Tr. (In re Banks*), 770 F. App'x 168 (5th Cir. 2019).

[102] *Id.* at 628 n.4.

[103] Case No. 16-42080-659, 2018 WL 5733508, at *5 (Bankr. E.D. Mo. Oct. 10, 2018), *rev'd sub nom. Deighan Law, LLC v. Daugherty*, 615 B.R. 564 (E.D. Mo. 2020).

[104] 11 U.S.C. § 504(b)(1).

[105] *Deighan Law, LLC v. Daugherty*, 615 B.R. 564 (E.D. Mo. 2020).

[106] *Id.* at 570 (internal quotation omitted).

to pay attorney fees in installments over a period of time but not filing the debtor's case until the fees have been fully paid.

In *In re Cruz*,[107] the debtor retained UpRight Law to file her bankruptcy case and agreed to an installment plan for paying the fees that she owed to the firm. The debtor started making the fee installment payments in July 2016 but did not complete the payments until July 2017. UpRight assigned a lawyer to the debtor in March 2017. After her last payment in July 2017, the debtor underwent medical procedures and apparently lost contact with UpRight. She contacted the firm in November 2017 and "was informed that the firm had been trying to get in touch with her and that her file was in suspended status."[108] UpRight required her to pay $25 to "reinstate her bankruptcy file."[109] The debtor paid the reinstatement fee in December 2017. She met with the lawyer assigned to her by UpRight several times during the beginning of 2018—but no case was filed. In May 2018, the debtor was served with a collection lawsuit. Her UpRight lawyer told her not to worry and that "everything was going to be handled in the bankruptcy."[110] The debtor's bankruptcy case was not actually filed until July 2018—two years after she first contacted UpRight. The court found that the petition filed was merely a "skeleton petition" and suffered from multiple errors and defects. The court further found that the debtor's lawyer "wholly failed to assist [the debtor] in complying with the subsequent orders and notices regarding the insufficiencies in [the debtor's] bankruptcy filing."[111]

In *In re Roedl*,[112] another UpRight Law case, the trustee moved for disgorgement of attorney fees on the grounds that debtor's counsel failed to conduct a diligent investigation of the debtor's assets. Specifically, the debtor's schedules did not reflect a riding lawnmower. The court concluded that the nondisclosure was the fault of the debtor, who, according to the court, displayed a lack of candor with his lawyer. Nevertheless, the court took issue with the lawyer's delay in filing the case. As in *Cruz*, the debtor agreed to pay UpRight's attorney fees in installment payments. He began making payments in July 2019 and completed those in November 2019. His case, however, was not actually filed until thirteen months later, in December 2020. The court observed that such a delay in filing a case "can lead to a host of issues relating to the investigation of a debtor's financial affairs."[113] According to the court, "memories may fade, debtors may be subject to lawsuits, garnishments, or repossessions, or debtors may purchase and sell property." [114]

In *In re Swisher*,[115] the debtor disclosed a $10,602 tax refund, $9,453 of which would be non-exempt funds available to the estate. The debtor had used some of the refund to pay expenses but had as much as $3,500 "in cash on hand." The court observed that the debtor's

[107] Case No. 18-10208, 2020 WL 5083326, at *1 (Bankr. S.D. Tex. Aug. 27, 2020).
[108] *Id.* at *11.
[109] *Id.*
[110] *Id.* at *12.
[111] *Id.* at *33.
[112] 634 B.R. 777 (Bankr. S.D. Ill. 2021).
[113] *Id.* at 783.
[114] *Id.*
[115] *Richardson v. Swisher (In re Swisher)*, Case No. 17-70310, 2017 WL 5634594, at *1 (Bankr. C.D. Ill. Nov. 22, 2017).

attorney should have explained to her "that she would lose the non-exempt portion of those funds if she filed with the cash on hand."[116] If the attorney had adequately explained the situation, the court said, the debtor could have decided to delay her bankruptcy filing. The court noted that "[t]iming a bankruptcy filing to maximize the benefits of filing is not wrong" and that "an attorney who overlooks timing issues, such as those that arose here, does not provide competent representation to the client."[117]

5. Counseling Clients and Client Interviews

In *In re Finn*,[118] a debtor's lawyer affiliated with UpRight law failed to meet with his clients before filing their bankruptcy cases. The court held that the Illinois Rules of Professional Responsibility, as well as the Bankruptcy Code, "require an attorney representing a debtor in bankruptcy to thoroughly interview the client, to require the client to produce relevant information, to review the client's financial documents and other information provided, and to resolve any inconsistencies or questions before filing the case."[119] The court ordered disgorgement of all attorney fees paid to counsel and issued a public reprimand.

In *Hobbs v. Chesson*,[120] the United States trustee filed a motion alleging that a Lake Charles bankruptcy lawyer, Christian Chesson, never personally met with his clients prior to filing their bankruptcy cases. More importantly, the trustee alleged, Chesson's staff impersonated clients during statutorily mandated pre-filing credit counseling briefings and filed false credit counseling verifications with the court. Specifically, members of Chesson's staff impersonated individual debtors during telephone and online credit counseling briefings. The debtors were not present during these briefings. Nevertheless, Chesson's office filed certifications affirming that the debtors had attended the required credit counseling briefing. Chesson represented that he never instructed his staff to impersonate debtors during credit counseling sessions and was unaware of the practice. The court ultimately concluded that Chesson failed to properly supervise his staff and thus violated Louisiana Rule of Professional Conduct 5.3, which provides that a supervising attorney must make reasonable efforts to ensure that the conduct of his nonlawyer assistants is compatible with the lawyer's own professional obligations.[121] The court also found a violation of Rule 3.1, which provides that an attorney may not bring a proceeding without a basis in law or fact.[122] The court ultimately suspended Chesson for ninety days and ordered disgorgement of attorney fees.[123]

6. Fee Considerations in Filing Chapter 13

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[116] *Id.* at *4.
[117] *Id.* at *5.
[118] Case Nos. 19-71144 & 19-71778, 2020 WL 6065755, at *1 (Bankr. C.D. Ill. Aug. 28, 2020).
[119] *Id.* at *7.
[120] No. 16-00201, 2018 WL 4172667, at *1 (Bankr. W.D. La. Aug. 29, 2018).
[121] *Id.* at *13.
[122] *Id.*
[123] *Id.* at *13–14.

Many bankruptcy courts have adopted guidelines for "no-look" fees in chapter 13 cases.[124] No-look fees are generally "a presumptively reasonable" attorney fee set by the court that attorneys for chapter 13 debtors can accept in lieu of filing a formal fee application.[125] Guidelines for no-look fees usually describe the services that attorneys must provide in exchange for those fees.[126] No-look fees are paid in installments out of the chapter 13 monthly plan payments.[127] In other words, the fees are paid over time. The dilemma in choosing between chapter 7 and chapter 13 is that, while chapter 7 attorney fees are generally lower, in most cases they must be paid up front.[128] This leads lawyers to use chapter 13 as a "payment collection and enhancement device" for attorney fees when a debtor cannot afford to pay even modest chapter 7 fees up front.[129]

In *In re Brown*,[130] the debtor's monthly income consisted of $1,134 of Social Security benefits and $230 in rental income, for a total of $1,364. His monthly expenses were $1,214, resulting in monthly net discretionary income of $150. The debtor's only assets were $20 in cash, $800 in household goods, and $100 in clothes. He apparently did not own a house or a vehicle and listed only unsecured debts. The debtor's attorney filed a chapter 13 case on his behalf. The debtor's chapter 13 plan provided for monthly payments of $150 for thirty-six months, for a total of $5,400. Of this amount, $2,000 was to be allocated for attorney fees, $281 for the filing fee, $50 for credit counseling, $20 for a credit report, and 4.5% of each payment for the chapter 13 trustee's commission. The bankruptcy court sustained the trustee's objection to plan confirmation on the grounds that the plan was proposed in bad faith. The trustee argued that the debtor's case should have been filed as a chapter 7 case, given the debtor's income, the lack of any secured debts, and the debtor's limited assets. The trustee also noted that, under the terms of the plan, creditors would have to wait at least seventeen months before they received any payments. Accordingly, the trustee argued that the only reason for filing the case under chapter 13 was to pay attorney fees. The bankruptcy court agreed. According to the court, the debtor was a "quintessential candidate [ ] for chapter 7 relief."[131] The court also noted that there was "no meaningful adjustment of [the debtor's] debts and [that] none of his assets were being protected."[132] Instead, the proposed plan was purely "attorney-fee-centric."[133] On appeal, the Eleventh Circuit affirmed the bankruptcy court's denial of confirmation of the

[124] *See, e.g., In re Riley*, 577 B.R. 497 (Bankr. W.D. La. 2017), *aff'd sub nom. McBride v. Riley*, Case No. 1:17-01302, 2018 WL 1768602 (W.D. La. Apr. 12, 2018), *aff'd in part,* 923 F.3d 433 (5th Cir. 2019).

[125] *Id*. at (internal quotation omitted).

[126] *Id*.

[127] *Brown v. Gore* (*In re Brown)*, 742 F.3d 1309, 1314 (11th Cir. 2014) (explaining that "[i]n most chapter 13 cases, paying attorney fees through a plan is not only permitted, it is the norm") (quoting *In re Jackson*, Nos. 11-42528-JJR-13, 11-42825-JJR-13, 2021 WL 909782, at *7 (Bankr. N.D. Ala. Mar. 16, 2012), *aff'd sub nom. Brown v. Gore (In re Brown)*, No. 1:12-CV-02202-RDP, 2012 WL 6609005 (N.D. Ala. Dec. 13, 2012))).

[128] *See id*. at 1312 ("A Chapter 7 case was thus clearly more beneficial to Brown except for the fact that his attorney's fees could not be financed through a Chapter 7.").

[129] Jackson, 2021 WL 909782, at *4.

[130] *Brown*, 742 F.3d T 1310.

[131] *Id.* at 1314 (internal quotation omitted).

[132] *Id.*

[133] *Id.* (internal quotation omitted).

debtor's chapter 13 plan after looking to the fourteen factors set forth in *In re Kitchens*[134] in determining whether the plan was proposed in bad faith.[135]

In *In re Puffer*,[136] the debtor had disposable income of $100 per month and $15,000 of unsecured liabilities. The debtor consulted with a lawyer about filing a bankruptcy case. The lawyer explained the differences between filing a chapter 7 case and filing a case under chapter 13. Specifically, the lawyer advised the debtor that a chapter 7 case was the "conventional course" for a debtor with his income and purely unsecured debt.[137] The debtor, however, could not pay the required attorney fees up front for a chapter 7 case. Accordingly, the lawyer filed the debtor's case as a chapter 13 case. The debtor's proposed chapter 13 plan provided for payments of $100 per month for thirty-six months, for a total of $3,600. All of this $3,600 would go to pay attorney fees, as well as the trustee's fees—in other words, it was a "fee-only" plan.[138] The bankruptcy court denied confirmation on the grounds that the plan was not proposed in good faith.[139] On appeal, the First Circuit reversed and remanded. The court rejected a per se rule prohibiting fee-only chapter 13 plans; rather, the court must consider the "totality of the circumstances."[140]

In *Wiener, Weiss & Madison v. Fox*,[141] two law firms sued their client for services rendered in a complex chapter 11 case. Fox was the former wife of Harold Rosbottom. Rosbottom filed his chapter 11 case to thwart an order by the state court judge in the couple's divorce proceeding appointing a receiver to oversee the couple's community estate, which consisted largely of licensed gaming enterprises. The plaintiffs initially agreed to represent Fox on an hourly fee basis in connection with her former husband's bankruptcy case. The plaintiffs ultimately submitted fee applications for which they were paid $1.2 million from the estate. Fearing that the court would not approve additional applications for fees billed on an hourly basis, the plaintiffs requested that Fox enter into a contingency fee agreement, which assigned them "up to a 35% interest in the gross proceeds (whether cash or property) that Fox received for her claims against the bankruptcy estate and as an equity owner of the bankruptcy estate of her husband."[142] The chapter 11 plan was ultimately confirmed, and the terms of the plan provided Fox with a 100% equity interest in a business entity, Louisiana Truck Stop and Gaming. In 2013, the plaintiffs informed Fox that if she "wanted them to stay on," she had to "increase the contingency percentage" from 35% to 40%.[143] Fox agreed. In 2016, the plaintiffs requested that Fox amend the 2013 fee agreement to provide that the plaintiffs would "receive 40% of any distributions of property or cash that [Fox] receive[d] rather than any outright ownership."[144] The plaintiffs requested this change because they believed that a direct equity share in the Truck Stop entity would be

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[134] *See Kitchens v. Ga. R.R. Bank & Tr. Co. (In re Kitchens)*, 702 F.2d 885 (11th Cir. 1983).
[135] *Brown*, 742 F.3d at 1316–19.
[136] *Berliner v. Pappalardo (In re Puffer)*, 674 F.3d 78 (1st Cir. 2012).
[137] *Id.* at 80.
[138] *Id.* at 80–81 (internal quotation omitted).
[139] *Id.* at 81.
[140] *Id.* at 82–83.
[141] 971 F.3d 511 (5th Cir. 2020).
[142] *Id.* at 513.
[143] *Id.* (internal quotations omitted).
[144] *Id.* (internal quotation omitted).

too unwieldy. This time, however, the plaintiffs suggested that Fox consult with independent counsel, which she did. After that consultation, Fox declined to execute the amended agreement. As a result, the relationship between the parties soured, and the plaintiffs filed claims for breach of contract, specific performance, and quantum meruit.

The district court ultimately entered a judgment against Fox, finding that the 2013 agreement was "fair and reasonable" and that it complied with the Louisiana Rules of Professional Conduct (which largely track the Model Rules). On appeal, the Fifth Circuit disagreed. The court found that the 2013 agreement was a "business transaction" subject to the requirements of Rule 1.8(a).[145] Rule 1.8 requires, inter alia, that "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." Because that advice was not provided in connection with the 2013 agreement, the agreement was unenforceable. Accordingly, the Fifth Circuit vacated the district court's judgment and remanded the case for consideration of the plaintiffs' quantum meruit claim.[146]

7. Subchapter V Considerations

In *In re Louis*,[147] the bankruptcy court cited deficiencies in the work of both debtor's counsel and the subchapter V trustee. The debtor's case had been originally filed as a chapter 13 case. The court noted that it was a problem case for a number of reasons. First, the debtor exceeded the debt limits for a chapter 13 case. In addition, the debtor had not filed tax returns for several years. Accordingly, his case was subsequently converted to a case under subchapter V. The court noted numerous deficiencies in schedules and filings by debtor's counsel after the conversion. For example, debtor's counsel failed to file a disclosure statement with the plan and omitted necessary financial information and schedules. The court noted this "lack of effort, attention, and follow through in what should have been a fairly straightforward case" and concluded that debtor's counsel was not prepared to represent the debtor in subchapter V.[148] The court also critiqued the trustee, noting that there had not been even an attempt to negotiate a consensual plan and that the trustee did not appear to be versed in the treatment of priority tax claims. As a result, a process that should have been streamlined was not.

[145] *Id.* at 513, 517 ("We agree with these courts that a contingency fee arrangement resulting in an attorney owning part of the client's business is a business transaction under Rule 1.8(a).").

[146] *Id.* at 517–18.

[147] Case No. 20-71283, 2022 WL 2055290 (Bankr. C.D. Ill. June 7, 2022).

[148] *Id.* at *14, 16.

HYPOTHETICAL #3

Ms. Equity Owner is the holder of all stock in a chapter 11 debtor company and is also a significant creditor and party in interest in the company's bankruptcy case due to personal guarantees. Ms. Equity Owner's former spouse, Mr. Ex-Husband, is also a creditor and party in interest because the guarantees were made during their marriage, even though he does not remember signing them. After witnessing a harsh exchange between Ms. Equity Owner and Mr. Ex-Husband, Mr. Ex-Husband's counsel perceives that Mr. Ex-Husband acquiesces to whatever Ms. Equity Owner demands.

Mr. Ex-Husband ignores his counsel's advice, even when confirmed in emails. His counsel notices that Mr. Ex-Husband is experiencing some memory loss issues and that his signature is shaky and strikingly different from his signatures on the guarantees. A neighbor brings Mr. Ex-Husband to meetings with his counsel, and the neighbor has expressed to counsel some concern about Mr. Ex-Husband's ability to care for himself and make informed decisions.

The proposed chapter 11 plan calls for Mr. Ex-Husband to fund a large portion of the payments to creditors in satisfaction of unfiled causes of action against him on the guarantees. These payments will impair Mr. Ex-Husband's ability to continue living on his own or pay for moving into an assisted living facility. Mr. Ex-Husband's counsel notes that, under the plan, only Ms. Equity Owner's funding for plan payments is characterized as a "new value" contribution enabling her to remain as the reorganized debtor's sole equity owner.

When counsel advises Mr. Ex-Husband that this treatment is objectionable and questions whether his guarantee signatures were forged, Mr. Ex-Husband says that he does not recall, appears confused and anxious, and expresses concern about not doing what Ms. Equity Owner wants him to do.

What should Mr. Ex-Husband's counsel do?

DISCUSSION AND RELEVANT MATERIALS

1. Model Rules

Model Rule 1.7 (Conflicts of Interest: Current Clients) provides that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one 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.[149]

Model Rule 1.14 (Client with Diminished Capacity) states as follows:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[150]

2. Making Decisions for an Incompetent Client

In re Rivers[151] illustrates the ethical questions faced by bankruptcy counsel in dealing with a debtor who is mentally incompetent. The debtor in that case filed a chapter 11 case. He was a lawyer who had suffered a brain injury in a traffic accident twenty years earlier. As a result of his injury, the debtor "could easily be influenced by others regarding his financial affairs and was incapable of making independent judgments regarding his financial affairs

[149] MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 2023).
[150] MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2023).
[151] 167 B.R. 288, 293 (Bankr. N.D. Ga. 1994).

both prior to and during th[e] [c]hapter 11 case."[152] The debtor also suffered memory loss and was unable to make the financial decisions that an ordinary chapter 11 debtor must make during the case.

As his bankruptcy case progressed, the debtor failed to file required reports or to open a DIP account. The court noted that debtor's counsel failed to adequately educate the debtor about the requirements of chapter 11 and his duties as a debtor in possession. Counsel assisted the debtor with his legal practice and helped him design and place a new Yellow Pages ad. The debtor's prior ad had listed personal injury, DUI, and drug cases as the debtor's specialties. The new ad designed by debtor's counsel also listed "bankruptcy" as a specialty. The court concluded that counsel persuaded the debtor to list bankruptcy as a specialty "as a part of a scheme to have [the debtor] refer bankruptcy clients attracted by the ad to [debtor's counsel]."[153] That scheme included a contract that the debtor signed agreeing to provide legal services to his counsel's bankruptcy clients. The record also showed that counsel demanded that the debtor pay fees that had not been approved by the court. In addition, counsel settled claims and filed an adversary proceeding on the debtor's behalf without the informed consent of the debtor.

The court first found that debtor's counsel should not have filed a chapter 11 case on behalf of the debtor. "If a debtor in possession is incompetent, it should be apparent that reorganization is unlikely, if not impossible, and it is the duty of a court-appointed professional to bring that fact to the attention of the United States Trustee and the court."[154] The court also took issue with counsel's actions on behalf of an incompetent debtor. Section 327 of the Bankruptcy Code allows a debtor in possession to employ an attorney with court approval if the attorney does not "'hold or represent an interest adverse to the estate'" and is "'disinterested.'"[155] Here, the court found that debtor's counsel was not a "disinterested person" under section 101(14) of the Code. According to the court:

> Friedman [debtor's counsel] did not discharge his duty, and his dereliction was not due merely to ignorance or blunder. He knew that Rivers [the debtor] was incapable of managing a business. He knew Rivers had no professional assistance in basic bookkeeping. He knew or should have known that the income and expenses of the estate included not only what Rivers received in salary from his wholly owned professional corporation and what he spent personally, but also the gross income of the law practice and the operating expenses of that practice. He knew that Rivers was not timely filing the reports required by section 704(8). He knew that Rivers was incapable of preparing those reports because he sent Grosse [his associate] to gather financial information. He knew that Rivers was vulnerable to manipulation and control. He knew that Rivers was possessed with anxiety about the loss of yellow page advertisements and he knew that Rivers' practice depended in large measure on those

[152] *Id.*
[153] *Id.* at 295.
[154] *Id.* at 300 (citing *In re James Contracting Grp., Inc*., 120 B.R. 868, 873–74 (Bankr. N.D. Ohio 1990)).
[155] *Id.* (quoting 11 U.S.C. § 327).

> advertisements. He knew Rivers had a disability that manifested itself in occasional memory loss. He knew or should have known by the end of 1992 that Rivers' net income was not sufficient to permit a plan to be confirmed. He knew that Rivers had difficulties with at least two clients who wanted to fire Rivers and seek other counsel. He knew that Rivers was a "controllable person."
>
> From the beginning of the case, Friedman exercised effective control over important business and legal matters of the estate. In so doing, he effectively determined the scope of work he would perform and the cost of the services he purported to render. Knowing that Rivers had not and would not practice bankruptcy law, Friedman conceived a scheme to enrich himself using an advertisement designed to mislead the public and paid for by property of this estate. . . . Friedman's interest in generating clients for himself was in direct conflict with the interests of the estate.[156]

As a result, the court denied counsel's fee application, finding that counsel "sought and accepted postpetition compensation from the incompetent debtor without proper disclosure or authorization[ ] [and] that the work performed by Friedman was inferior, unnecessary and of no value to the estate . . . ."[157]

3. Family Members Making Decisions/Representations on a Debtor's Behalf

The family members of a debtor often play some role in the debtor's bankruptcy case. *In re Chapman*[158] is a case in which family members acting on behalf of the debtor crossed the line. Holly Olm contacted David Clowers, a bankruptcy practitioner, about filing a chapter 13 case. Olm made an appointment with Clowers' office and met with his paralegal. When Olm arrived for her appointment, she disclosed that the bankruptcy case was not for her, but rather was intended for her mother, Lee Chapman. Olm showed the paralegal a power of attorney purportedly allowing her to act for her mother. Olm informed the paralegal that a sheriff's sale of her mother's house was scheduled for the next day, so an "emergency" filing would be required. Olm attempted to provide her mother's financial history to the paralegal to prepare the filing, but she did not tell the paralegal or Clowers that her mother had filed two previous bankruptcy cases. As a result, the stay was not automatic under section 362(c)(4)(A)(i) of the Bankruptcy Code, and the debtor would have to file a motion under section 362(c)(4)(B) to receive the benefit of a stay. After the case was filed, counsel for the mortgage company moved to confirm that there was no stay in place. Clowers filed a motion to continue the stay, unaware that this was Chapman's third bankruptcy filing within a year.[159] When Clowers learned about the two prior filings, he withdrew his motion, and the court granted the mortgage company's motion. Clowers

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[156] *Id.* at 301-02.

[157] *Id.* at 306–07.

[158] 616 B.R. 523, 525 (Bankr. E.D. Wis. 2020).

[159] Olm had apparently disclosed one prior bankruptcy filing to Clowers' paralegal. But Chapman's bankruptcy filing did not disclose any prior filings, much less the two prior filings that impacted the stay.

then filed a motion to impose the stay but subsequently withdrew that motion. Thereafter, the mortgage company filed a motion for sanctions against both Clowers and Chapman.

At the hearing, Chapman testified that she was unaware that the bankruptcy case had been filed until she was informed of the filing by a social worker. She also did not know that (1) her house payments were in arrears, (2) she was delinquent on taxes, (3) her home insurance had lapsed, or (4) she had filed multiple prior bankruptcies on the eve of foreclosure sales.[160] She explained to the court that she and Olm had agreed to "pool" their resources and that Olm was handling her finances.[161] Clowers testified that he relied on the information provided by Olm and that, because of the emergency filing, he did not have time to conduct a thorough investigation.

The court ruled that Clowers' "emergency" filing violated his obligation under Rule 9011 of the Federal Rules of Bankruptcy Procedure to reasonably investigate and confirm the accuracy of the facts he pled in Chapman's bankruptcy petition. As a result, Clowers filed a petition that erroneously stated that Chapman had not filed two prior bankruptcy cases. The emergency nature of the filing did not relieve Clowers of his obligation:

> In sum, the Clowers firm took Ms. Olm, the power of attorney, at her word, and because of self-imposed time limits, avoided the easy step of checking PACER records of Mrs. Chapman's previous bankruptcy, where Attorney Clowers or his paralegal would have learned that the debtor had not one, but two prior cases. They would have known that a stay was not automatic. The rush to file is reflected in the fact that the petition erroneously states "no previous cases."[162]

The court awarded a sanction in the amount of one-third of the mortgage company's reasonable attorney fees incurred in litigating the stay.

In *In re Santos*,[163] Gabriel Santos, a serial bankruptcy filer, was barred from filing bankruptcy for 180 days after his most recent chapter 13 case was dismissed with prejudice. To avoid the 180-day bar and prevent an imminent foreclosure of his house, Santos filed bankruptcy in his ex-wife's name. She did not authorize the filing, nor did Santos have a power of attorney to file the case in her name. Santos engaged an experienced bankruptcy attorney, Steve Le, to file his ex-wife's case. Le met with Santos but never met with or spoke to Santos' ex-wife; nor did he obtain any "wet" signatures. Le also filed a certificate of credit counseling certifying that the debtor had completed online credit counseling even though, according to Santos, she was "out of town" and unavailable. When she learned of the filing, Santos' ex-wife contacted the United States Trustee's Office to report that she had not authorized the bankruptcy filing. The trustee filed a motion for a show cause order, and the court held a hearing. The evidence introduced at the hearing established that Santos created a fake email account in his ex-wife's name and sent email messages purportedly

[160] *Id*. at 527.
[161] *Id.*
[162] *Id.* at 529.
[163] 616 B.R. 332 (Bankr. N.D. Tex. 2020).

from her to Le authorizing the bankruptcy filing and attaching financial statements. Santos also sent a false credit counseling certificate in his ex-wife's name to Le using the fake email account. When Le indicated that he had to speak to Santos' ex-wife, Santos dialed a number that went to voicemail and explained to Le that his ex-wife was out of town at a funeral. Le admitted that he knew at the time that he had to obtain a wet signature but filed the case anyway even though he did not get a wet signature.

The bankruptcy court concluded that Le's conduct violated the following Bankruptcy Code provisions, Federal Rules of Bankruptcy Procedure, and state rules of professional conduct:

- **Section 526**—Subsection (a)(2) specifically prohibits a debt relief agency from making "any statement, or counsel[ing] or advis[ing] 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." 11 U.S.C. § 526(a)(2). The court found that Le violated this provision by, *inter alia*, "making numerous untrue and misleading statements in the Voluntary Petition and its attachments, including the Schedules, the SOFA, and the Verification of Mailing, among others.[164]

- **Section 527**—This provision requires attorneys to make certain disclosures or take certain actions. According to the court, because "Le never actually met with Mrs. Ramos or spoke with her before using her social security number to file bankruptcy, he neglected to perform any of the duties Section 527 required him to perform."[165]

- **Section 528**—This statute governs retainer agreements formed between bankruptcy attorneys and their clients. Le violated this provision because he "never formed a written contract with Mrs. Ramos before filing the Petition. He never even spoke with her before filing."[166]

- **Rule 1008**—This rule requires that "[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746." In the words of the bankruptcy court, the rule "operates as a vitally important safeguard against fraudulent and unauthorized filings."[167] Le did not comply with Rule 1008.

- **Rule 9011**— "Le's filing of falsified documents was objectively unreasonable and . . . his willful violations were an abuse of the judicial process, despite his purported motive of simply wanting to help save a house."[168]

[164] *Id.* at 348.
[165] *Id.* at 349
[166] *Id.* at 350.
[167] *Id.* at 350–51.
[168] *Id.* at 352.

- **Texas Disciplinary Rules of Professional Conduct**—The court concluded that Le violated Rules 1.01 (Competent and Diligent Representation); Rule 1.02 (Scope and Objectives of Representation); Rule 1.03 (Communication); and Rule 3.03 (Candor Toward the Tribunal).[169]

The court suspended Le indefinitely, ordered him to attend and complete ethics CLE, and ordered disgorgement of fees.[170] In addition, the court made a criminal referral with respect to Santos.[171]

Additional cases:

- *In re Stomberg*, 487 B.R. 775, 780 (Bankr. S.D. Tex. 2013) (lawyer filed Statement of Financial Affairs and schedules without getting wet signatures).

- *Schwab v. Tanribilir (In re Klitsch)*, 587 B.R. 287, 290 (Bankr. M.D. Pa. 2018) (Pennsylvania state statute provides that an original signature can be electronic; Bankruptcy Code and Rules do not require "wet" signature but only compliance with verified signature requirements; ECF user's e-signature attests to possession of signed document).

- *In re Dobbs*, 535 B.R. 675, 679 (Bankr. N.D. Miss. 2015) (lawyer "put the Debtor in bankruptcy without the Debtor's authorization or knowledge, forged the Debtor's signature, had the Debtor's estranged wife take a credit counseling course in place of the Debtor, and then filed fabricated documents with the Court").

4. Competency Determinations and the Appointment of Guardians Ad Litem

The hypothetical addresses competency issues involving a *creditor*. While the bankruptcy rules do not specifically address competency in the context of creditors or other parties to a bankruptcy case, they do address competency issues involving debtors. Mental incompetency is not a bar to a debtor filing for relief under the Bankruptcy Code.[172] Rule 1004.1 of the Federal Rules of Bankruptcy Procedure governs when the debtor's competency is at issue at the time of filing. This rule expressly empowers the bankruptcy court to appoint a guardian ad litem for an incompetent debtor:

> If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise

[169] *Id.* at 353–54.
[170] *Id.* at 356–57.
[171] *Id.* at 357–58.
[172] *In re Zawisza*, 73 B.R. 929, 931 (Bankr. E.D. Pa. 1987).

> represented or shall make any other order to protect the infant or incompetent debtor.

The "shall" language of the rule indicates that the court must appoint a guardian ad litem for an unrepresented incompetent debtor or, if a guardian is not appointed, the court must enter orders necessary to protect the incompetent debtor. Rule 1016, on the other hand, applies when the debtor becomes incompetent *during* the bankruptcy case:

> Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

In *In re Brown*,[173] the debtor had filed three prior chapter 13 cases with the help of different counsel. The debtor's daughter assisted with these cases, but no representative was formally appointed in any of them to represent the debtor. All three cases were dismissed. In the debtor's fourth case, debtor's counsel sought appointment of a representative for the debtor. Counsel argued that the debtor was unable to manage his own affairs and that appointment of a representative would be in the debtor's best interest. The debtor testified that he had difficulty managing his financial affairs as a result of a stroke that he suffered several years prior to his bankruptcy filing. The court observed that it was apparent from the debtor's testimony that he "had great difficulty understanding the questions being asked and recalling prior events."[174] The court noted that mental competency under the bankruptcy rules turns on the applicable state law definition of competency. The court ultimately ruled that the debtor was incompetent under South Carolina law.

The debtor's petition was signed on the debtor's behalf by his "Intended Representative" as "Next Friend 1004.1 FRBP."[175] The proposed representative was the debtor's son, who testified that he lived with the debtor and understood the debtor's financial affairs. While the debtor's son held a "healthcare power of attorney" executed by the debtor, he did not possess a general power of attorney. The court first found that the motion was incorrectly filed as a motion under Rule 1016. According to the court, Rule 1016 applies to cases in which the debtor becomes mentally incompetent during the course of the case. Here, the debtor was allegedly incompetent prior to filing. Accordingly, the debtor's motion had to be judged under Rule 1004.1. The court ruled that the debtor's son was not a "Rule 1004.1 representative" because his powers were limited to healthcare decisions, not general financial decisions. However, the court found that the proposed representative fell within the broad definition of the term "next friend" as used in Rule 1004.1. ("'An . . . incompetent

[173] 645 B.R. 524 (Bankr. D.S.C. 2022).
[174] *Id.* at 527.
[175] *Id.*

person who does not have a duly appointed representative may file a voluntary petition by next friend . . . .'").[176] As a result, the court concluded that, while the debtor's son could commence the case on behalf of his father, he could not "continue prosecuting the case in that capacity . . . because a next friend is not a fiduciary with specific duties and obligations."[177] The court noted, however, that the debtor's son could be formally appointed as the debtor's guardian ad litem under Rule 1004.1 even though the debtor's motion did not request that relief.

In *In re Maes*,[178] the debtor suffered from severe dementia and memory loss and forgot to make her monthly mortgage payments. In order to stop foreclosure proceedings, the debtor's daughter had the debtor sign a power of attorney so that her daughter could file a petition for relief under chapter 13 on her behalf. The debtor's daughter signed the bankruptcy petition "Juanita Maes, as attorney-in-fact for Jennie Adelle Maes."[179] The debtor's Statement of Financial Affairs and schedules were also signed by the debtor's daughter as her "attorney-in-fact." The court, however, concluded that the powers of attorney executed by the debtor were not valid under Colorado law. The court identified Rule 1004.1 as the applicable authority and explained that this rule requires a court to progress through various rulings with respect to an incompetent debtor:

> These procedural rules require the Court to engage in a decision tree of determinations when incompetency issues are raised. First, the Court must decide whether the Debtor was incompetent when the Petition was filed on August 19, 2019, or whether the Debtor became incompetent after the commencement of the bankruptcy case. If the former, then Fed. R. Bankr. P. 1004.1 applies; if the [latter], then Fed. R. Bankr. P. 1016 applies.
>
> If Fed. R. Bankr. P. 1004.1 is applicable, then the Court must determine if the Debtor had a formal "representative" at the time of the bankruptcy Petition such as a "general guardian, committee, conservator, or similar fiduciary" and whether that person filed the bankruptcy Petition. . . . If the Debtor had no formal "representative," then the Court must decide whether the bankruptcy Petition was filed by a "next friend or guardian ad litem." If a guardian ad litem initiated and signed the bankruptcy petition, the inquiry is complete and the case may proceed. However, if only a "next friend" started the bankruptcy proceedings, then the Court must appoint a guardian ad litem or take other action to protect the incompetent debtor; the Court cannot just let the "next friend" continue along in prosecuting the bankruptcy case.[180]

The court concluded that, under Colorado law, the debtor was incompetent at the time that the bankruptcy case was commenced. According to the court, the debtor's daughter

[176] *Id.* at 528 (quoting Rule 1004.1).
[177] *Id.* at 529 (internal citation omitted).
[178] 616 B.R. 784, 788–89 (Bankr. D. Colo. 2020).
[179] *Id.* at 789.
[180] *Id*. at 796–97 (internal quotations and citations omitted).

qualified as a "next friend" with the authority to commence a bankruptcy case for her incompetent mother under Rule 1004.1. However, because the daughter's powers of attorney were invalid, she could not continue the case merely as the debtor's "next friend." The court thus rejected the reasoning of other bankruptcy courts that allowed a "next friend" to pursue a bankruptcy case without the formal appointment of a guardian ad litem:

> The Court respectfully disagrees with all decisions in which bankruptcy courts have elected to appoint a "next friend" rather than a "guardian ad litem" under Fed. R. Bankr. P. 1004.1. Such cases contain no real legal analysis or rationale for appointing a next friend. Quite simply, Fed. R. Bankr. P. 1004.1 does not authorize the bankruptcy court to appoint a next friend. It says no such thing. Instead, Fed. R. Bankr. P. 1004.1 explicitly speaks only to the appointment of a guardian ad litem. And, the Court is concerned that having a next friend administer a bankruptcy proceeding would be unclear and problematic. Next friends have no specific duties or obligations. In bankruptcy, it is critical for duties to be identified through the Bankruptcy Code and, in this Court's view, to be performed by a fiduciary if the Debtor is unable to perform the duties. Under a plain reading of Fed. R. Bankr. P. 1004.1, the Court is not permitted to appoint Juanita Maes as the Debtor's next friend.[181]

Nevertheless, the court concluded that Maes' daughter was qualified to be appointed as the debtor's guardian ad litem.

In *In re Moss*,[182] on the other hand, the court determined that the debtor had become incompetent during the bankruptcy case. In that case, the debtor was indicted for bankruptcy fraud and incarcerated after she had filed her case under chapter 7.[183] The district court determined that she was unable to assist in her defense and ordered that she undergo treatment at a mental health facility. The bankruptcy court also noted that her conduct during prior bankruptcy hearings demonstrated "her inability to competently participate in her bankruptcy case."[184] The chapter 7 trustee moved for the appointment of a guardian ad litem. The court noted that Rule 1016 provides that, where a debtor becomes incompetent during a chapter 7 liquidation case, "'the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.'"[185]

The court first noted that this provision does not define "competency." Because questions of mental competency have "traditionally been an area left to the various state laws," the court ultimately turned to Missouri law on competency.[186] After an exhaustive analysis of

[181] *Id*. at 801.
[182] 239 B.R. 537 (Bankr. W.D. Mo. 1999).
[183] *Id*. at 538.
[184] *Id*.
[185] *Id.* at 539 (quoting Rule 1016).
[186] *Id.* at 539–40.

the evidentiary record and the factors that Missouri state courts look to in determining competency, the court concluded that the debtor was incompetent.[187]

The court also noted that Rule 1016 does not provide express authority to appoint a guardian ad litem to represent the debtor's interests while the case proceeded. The court first examined its equitable powers under section 105 of the Bankruptcy Code, which provides that:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

The court then considered Federal Rule of Civil Procedure 17 (made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7017). Specifically, Rule 17(c)(2) provides broad authority for a court to appoint a guardian ad litem for any party in a civil proceeding:

> A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

While Rule 7017 incorporates Rule 17, the court noted that it does so with respect to adversary proceedings.[188] Nevertheless, citing *In re Zawisza*,[189] the court reasoned that the purpose of Rule 17(c) would be served by appointing a guardian ad litem and concluded that it had the authority to do so under section 105. The court then cautioned that Rule 7017 does not, standing alone, authorize the court to appoint a guardian: "Note that we do not rely on Rule 7017 for the authority to appoint a limited guardian; that authority is found in § 105. Rule 7017 merely provides the statutory anchor for our use of § 105 to appoint a limited guardian for the Debtor."[190]

Moss discusses the appointment of a guardian ad litem or next friend for an incompetent *debtor*. However, the law cited by the court in *Moss* may have broader application, including to cases involving incompetent creditors and other parties to a case. Specifically, the bankruptcy court's power under section 105 is not limited to debtors, and Federal Rule of Civil Procedure 17(c), made applicable to adversary proceedings by Bankruptcy Rule 7017, provides that an incompetent person may sue or defend through a general guardian, a committee, a conservator, or a like fiduciary. Those rules provide that the court must

[187] *Id*. at 539-42.
[188] Under Rule 9014(c), Rule 7017 also applies to contested matters.
[189] 73 B.R. 929,935–36 (Bankr. E.D. Pa. 1987).
[190] *Moss*, 239 B.R. at 545.

appoint a guardian ad litem to protect an incompetent person who does not have such a representative in a civil lawsuit or an adversary proceeding.[191] Rule 7017 is among the rules that apply to contested matters.[192]

[191] Fed. R. Civ. P. 17(c)(2), made applicable to adversary proceedings by Fed. R. Bankr. P. 7017. *See also Zawisza*, 73 B.R. at 935 (noting that Federal Rule of Civil Procedure 17(c) "has been interpreted to mean that, if an incompetent does not have a validly-appointed representative, the federal court in which the suit is brought may name a guardian ad litem or next friend to represent him, regardless of state law").

[192] Fed. R. Bankr. P. 9014(c).

HYPOTHETICAL #4

In an individual chapter 11 case, counsel for the debtor in possession incurred $65,000 defending a scorched earth objection to discharge and dischargeability filed by the debtor's former spouse and ultimately settled for $12,000. DIP counsel also incurred $16,000 pursuing a preference claim against Big Bank, which had garnished the debtor's $20,000 tax refund. (The garnished funds were transferred within the ninety-day preference period, but the writ was served outside that period.)

DIP counsel also filed a civil rights discrimination claim seeking $500,000 damages. After six months of litigating that claim, defendant City Government disclosed fact and expert witnesses, who DIP counsel deposed two months later. Their testimony increased the risk of an adverse verdict and caused DIP counsel to search for and work with a rebuttal expert. By the end of the first year of litigation, DIP counsel had managed to defeat a motion for summary judgment but has already incurred $210,000 of her own fees and an additional $35,000 in expert fees, with jury trial preparation and expense still on the horizon. The debtor adamantly insists that she deserves to win, will win, and will not consider walking away or settling.

What are DIP counsel's duties and risks?

DISCUSSION AND RELEVANT MATERIALS

1. *In re Taxman Clothing Co*., 49 F.3d 310 (7th Cir. 1995)

An attorney, Philip Aimen, was retained by the bankruptcy trustee to pursue preferences allegedly avoidable under section 547(b) of the Bankruptcy Code. In the end, after three to four years of litigation, Aimen filed an application seeking almost $85,000 in fees even though he recovered nothing from the preference actions. Judge Posner noted that as a "lawyer hired by a trustee in bankruptcy to do legal work for the estate," Aimen "like the trustee himself, [was] a fiduciary of the estate."[193] But "neither the trustee in bankruptcy nor the trustee's lawyer has a duty to collect an asset of the debtor's estate if the cost of collection would exceed the value of the asset."[194] The cost of collection here, $85,000, far exceeded even the anticipated value of the claims (if successful) at the beginning of the litigation—approximately $33,000. The court concluded that Aimen breached his fiduciary duty to the estate and ordered that he could retain no fees beyond the $7,000 that he received in response to his first request for interim fees. The court noted that the result may have been different if Aimen had originally projected litigation costs of, say $5,000, and those costs unexpectedly increased for reasons beyond his control.

2. *In re Hosp. Partners of Am., Inc*., 597 B.R. 763 (Bankr. D. Del. 2019)

This is another case in which the cost to pursue avoidance claims exceeded the recovery. A chapter 7 trustee hired professionals to pursue preference and fraudulent transfer claims. In the end, "the cash recovery for all avoidance actions total[ed] approximately $273,625, and . . . the fees identified in the Fee Applications associated with this recovery were $445,477, or approximately $171,852 more than the cash recovery."[195] The United States trustee objected to the fee application, arguing that the chapter 7 trustee and his professionals failed to "analyze . . . avoidance actions as they proceeded[ ] and [ ] abandon them at any point that they appeared likely to be a net drain on the estate."[196]

Section 330(a)(4)(A) of the Bankruptcy Code provides that the "court shall not allow compensation for—(i) unnecessary duplication of services; or (ii) services that were not—(I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." The court explained that this provision "does not go so far as to require the [c]ourt to disallow fees simply because the estate ultimately does not profit from the services of the professionals in question."[197] However, the court would not allow "compensation for services that were not 'reasonably likely to benefit the debtor's estate' at the time the services were rendered, *based on the information available at that time*."[198] Applying this standard, the court noted that the trustee and his professionals acted selectively in deciding which claims to pursue. For example, the court cited testimony

[193] 49 F.3d at 314 ("Aimen was not a wind-up toy set in motion by the trustee. He had an independent fiduciary duty to the estate.").

[194] *Id.* at 315.

[195] *Hosp. Partners*, 597 B.R. at 765.

[196] *Id.*

[197] *Id.* at 766.

[198] *Id.* at 767 (emphasis added).

showing "a number of significant economic benefits flowing from the preference action program" even though the estate did not receive a direct cash infusion.[199] Specifically, the pursuit of one preference action resulted in a broader settlement that benefited the estate even though the specific action did not bring cash into the estate. The court, therefore, overruled the objection to the fee applications.

3. *In re Reynolds*, Case No. 2:18CV398 DAK, 2019 WL 4645385 (D. Utah Sept. 24, 2019), *aff'd,* 835 F. App'x 395 (10th Cir. 2021)

On appeal, the district court framed the issue before it as follows:

> The bankruptcy court denied the bulk of Appellant's requested fees as unnecessarily duplicative, unnecessary to the administration of the estate, or not reasonably likely to benefit the Debtors' estate under § 330(a)(4)(A). Specifically, the bankruptcy court denied $8,493.50 of fees related to the sale of the Lots, and described in Appellant's Fee Application as "Sale of Property," because these services should have been performed by the Trustee and did not warrant the use of Appellant's time or expertise. Seventy-five percent of these fees were billed by a paralegal and involved communications with the Trustee, the real estate agent, the title company, and potential buyers. The bankruptcy court held that none of these services involved contested or complex legal issues requiring the assistance of legal counsel and so it disallowed all fees in this category as unnecessary to the administration of the estate under § 330(a)(4)(ii)(II).[200]

The district court affirmed the bankruptcy court, finding that the bankruptcy court properly applied the standards under section 330(a)(4)(ii) and did not abuse its discretion.

4. *In re Contreras*, Case Nos. 18-30995, 16-34693, 16-35750, 18-33054, 2019 WL 1868622 (Bankr. S.D. Tex. Apr. 25, 2019)

In *Contreras*, the bankruptcy court addressed deficiencies in the services provided by a chapter 13 "mass filer"—Reese W. Baker—in a number of cases. Specifically, the court noted the following uniform issues with Baker's services: (1) billing records reflected that paraprofessionals performed clerical or secretarial services such as reviewing the trustee's website and reviewing dockets, which were not necessarily compensable; (2) billing records indicated charges for deficient filings that were either denied or needed to be amended; (3) billing records reflected that paraprofessionals and attorneys were performing what appeared to be duplicative tasks; (4) as a board-certified attorney, Baker had to be held to a higher duty of care and was be expected to have a greater experience level than attorneys who do not hold a board certification; and (5) the total fee requested

[199] *Id.* at 769.
[200] *Reynolds*, 2019 WL 4645385, at *4.

was unreasonable as it exceeded both the amount reasonably necessary for the work required to be performed to date and the prevailing rate for similar work.[201]

At a hearing on the matters, the court did not find Baker's testimony credible and concluded that his fees were inflated. The court determined that Baker's time records reflected significant and unnecessary duplication of effort. According to the court, "the number of individuals Baker has billing on a single simple Chapter 13 case is extremely rare"; the court noted that it was "not aware of any other law firm using or needing this many people to work on a single Chapter 13 case."[202] The court observed that, in each of Baker's cases at issue, four lawyers and eight paralegals had submitted billing.

5. *Jubber v. Bird (In re Bird)*, 577 B.R. 365, 372 (B.A.P. 10th Cir. 2017)

The *Bird* case involved two chapter 7 cases in which the same trustee filed objections to the debtors' homestead exemptions and sought to sell their homes. In both cases, the trustee's efforts to challenge the homestead exemptions were denied. The trustee nevertheless heavily litigated the objections, including multiple appeals of adverse rulings. The bankruptcy court sustained objections to the fee applications filed by the trustee and the trustee's professionals under section 330(a)(4)(A)(ii) of the Bankruptcy Code. As the BAP explained:

> In determining Trustee and Counsel's services were unnecessary, the bankruptcy court found that, here where the Homesteads had no equity value in excess of liens but were subject to valid homestead exemptions, Trustee had "no obligation to seek carve-outs from secured creditors or sell encumbered property subject to such agreements."
>
> For several reasons, the bankruptcy court also concluded the services provided were not reasonably likely to benefit Debtors' estates, i.e., result in a meaningful distribution to unsecured creditors. First, the bankruptcy court determined the proposed sales of the Homesteads were not authorized by any subsection of § 363(f). Specifically, the homestead exemptions were not subject to a bona fide dispute under § 363(f)(4), and Debtors could not be compelled to accept a money satisfaction under § 363(f)(5). Second, the bankruptcy court reasoned that even if the sales were permitted, Debtors—and not unsecured creditors—would be entitled to the proceeds of the Carve-Outs as payment of their homestead exemptions.[203]

The BAP concluded that the bankruptcy court did not err in finding that the services performed by the trustee and its professionals with respect to the homestead exemption litigation was not necessary for the administration of the bankruptcy estates in the two cases reviewed by the court.

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[201] *Contreras*, 2019 WL 1868622, at *4–5.
[202] *Id.*, at *8.
[203] *Bird*, 577 B.R. at 372 (internal citation omitted).

6. *In re Vill. Apothecary, Inc.*, 608 B.R. 666 (Bankr. E.D. Mich. 2019)

In this case, the court addressed fee applications submitted by the trustee and his professionals for services rendered in connection with a chapter 7 case. Although no objections were filed, the court noted that the fees and costs requested totaled $40,710—which "would amount to 100% of the amount collected for the bankruptcy estate with the assistance of applicants' services, leaving nothing to be distributed to any non-administrative creditors."[204] The court found that the fees were disproportionately high compared to the financial benefit to the estate and reduced the trustee's fee request by 50%. On appeal, the district court concluded that the bankruptcy court erred by not "'expressly calculat[ing] the lodestar amount.'"[205] On remand, the bankruptcy court noted that it still had authority to consider the "results obtained" factor in calculating a lodestar. In considering the results obtained, the bankruptcy court again cut the trustee's fees.

7. *In re Cent. Ice Cream Co.*, 836 F.2d 1068 (7th Cir. 1987)

This case involved the settlement of a state court fraud and contract case in which the debtor, Central Ice Cream Company, obtained a $52 million verdict during the course of its bankruptcy. The defendant in the case offered to settle the case for $15.5 million if its offer was accepted before the state court considered post-trial motions. Both the debtor's board and the trustee recommended that the court approve the settlement. Certain equity holders objected. In approving the settlement, the bankruptcy court held that the settlement benefited stockholders as well as creditors. The stockholders appealed; their appeal was subsequently dismissed by the district court on the grounds that they were "not the proper parties."[206] In holding that the stockholders' claims were not frivolous, the Seventh Circuit focused on the trustee's admission that he prioritized the interest of creditors over shareholders, even though the estate was large enough to pay creditors' claims in full:

> The trustee preferred the creditors over the shareholders. The trustee's counsel, James Carmel, testified that in negotiating the settlement he "did not consider the interest of shareholders[."] This is an unusual posture for a trustee, whose duty is to maximize the value of the estate, not of a particular group of claimants. Central Ice Cream had assets sufficient to pay all creditors. This made the shareholders the residual claimants; each additional dollar would go to them. It is true, as the bankruptcy judge wrote, that spurning the settlement would expose the creditors to risk, but this parallels the risk creditors face outside of the bankruptcy process as firms try to maximize the expected value of the enterprise. The bankruptcy court should try to implement, rather than alter, non-bankruptcy entitlements. See *Butner v. United States,* 440 U.S. 48, 55, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136 (1979); Thomas H. Jackson, *The Logic and Limits*

[204] *Vill. Apothecary*, 608 B.R. at 670 (internal quotation omitted).
[205] *Id.* at 672 (quoting *In re Boddy*, 950 F.2d 334, 338 (6th Cir. 1991)).
[206] *Cent. Ice Cream*, 836 F.2d at 1070.

> *of Bankruptcy Law* 7–67 (1986). Both shareholders and creditors have such entitlements.[207]

The Seventh Circuit took note of the unique relationship of stockholders and creditors inside and outside of bankruptcy:

> Although shareholders outside of bankruptcy must file a derivative suit if they believe that the firm errs in accepting a compromise of pending litigation, bankruptcy alters the procedure by which investors of all kinds assert their claims. Creditors outside of bankruptcy may not challenge the firm's decisions; in bankruptcy they may do so, because they are (presumed to be) the principally affected persons, the new residual claimants. Shareholders, too, may pursue their contentions. Whether shareholders may do so *as parties* depends on whether the trustee adequately represents their interests. When, as here, the trustee professes not to represent their interests, they have a substantial reason to litigate independently. Whether that would have been sufficient we need not decide; it is enough to say that the claim is not frivolous—which means that the district court did not abuse its discretion in declining to impose sanctions for the act of filing an appeal.[208]

[207] *Id.* at 1072.
[208] *Id.* at 1073.