MID-SOUTH
COMMERCIAL LAW
INSTITUTE

46th Annual Commercial and Bankruptcy Law Seminar

December 4-5, 2025

Hilton Franklin Cool Springs
601 Corporate Centre Dr
Franklin, TN 37067

www.MidSouthSeminar.org

MID-SOUTH COMMERCIAL LAW INSTITUTE

46th Annual Seminar

December 4 - December 5, 2025

Franklin, Tennessee

MID-SOUTH COMMERCIAL LAW INSTITUTE
46th ANNUAL SEMINAR-THURSDAY, DECEMBER 4, 2025

TIME	SPEAKERS	PROGRAM
7:45-8:30		REGISTRATION AND BREAKFAST WELCOME REMARKS
8:30-10:00	William L. Norton, III Hon. Clifton Jessup Hon. M. Ruthie Hagan	Recent Developments in Chapter 11 Cases
10:00-10:15		BREAK
10:15-11:45	Michael Collins Aaron Todrin, CEO, Second Wind Consultants	Receiverships, Assignment for the Benefit of Creditors and Other Non-Bankruptcy Alternatives
11:45-12:45		LUNCH
12:45-1:45	Kara Ward	Washington Update – How to Interpret the Current Political and Policy Environment: What your Investors, Shareholders, and C-Suites Need to Know in Order to Master the Moment
1:45-3:15	John E. Murdock, III Amanda Stanley Hon. Anne C. Martin	Recent Developments in Commercial Law
3:15-3:30		BREAK
3:30-5:00	Hon. Barbara Holmes Ed Lanquist	Reel Ethics
5:00		RECEPTION

Thursday CLE: 7.0 Hours (1.5 Dual)

MIDSOUTH COMMERCIAL LAW INSTITUTE
46th ANNUAL SEMINAR FRIDAY, DECEMBER 5, 2025

TIME	SPEAKERS	PROGRAM
7:30-8:00		BREAKFAST
8:00-9:30	Hank Hildebrand Hon. William "Bill" Brown, Ret.	Recent Developments in Chapter 13 Cases
9:30-9:45		BREAK
9:45-11:15	Judges Panel – Hon. Suzanne Bauknight Hon. Nancy King Hon. Jimmy L. Croom	Judges Jeopardy
11:15-12:15		LUNCH
12:15-1:15	Vanessa Lantin – U.S.B.C., M.D., Tenn. Mac Halcomb – U.S.B.C., N.D., Al.	Best Practices from the Clerk's Perspective
1:15-2:45	Erica Johnson Hon. Nicholas Whittenburg Phillip Young	Recent Developments in Chapter 7 Cases
2:45-3:00		BREAK
3:00-4:30	Kevin D. Balkwill	Ethics in Bankruptcy Cases
4:30		CONCLUDING REMARKS

Friday CLE: 7.0 Hours (1.5 Dual) Total CLE: 14.0 Hours (3.0 Dual)

MID-SOUTH COMMERCIAL LAW INSTITUTE
2025-2026 OFFICERS AND DIRECTORS

The Mid-South Commercial Law Institute was organized in 1979 as a non-profit corporation for the purpose of providing seminars of high quality and reasonable cost to attorneys and others in Tennessee and surrounding states with interests in commercial law. Current officers and directors of the Institute are as follows.

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2025 MID-SOUTH COMMERCIAL LAW INSTITUTE FACULTY

Kevin D. Balkwill Ethics Law, PLLC 1659 Preston Place Brentwood, TN 37027 (615) 205-5540	Honorable Suzanne H. Bauknight United States Bankruptcy Court Howard H. Baker Jr. United States Courthouse 800 Market Street, Suite 330 Knoxville, TN 37902 (865) 545-4284
Honorable William "Bill" Brown, Ret. williamhoustonbr@comcast.net (970) 319-2103	Michael Collins Manier & Herod, P.C. 1201 Demonbreun Street, Suite 900 Nashville, Tennessee 37203 (615) 244-0030
Hon. Jimmy L. Croom United States Bankruptcy Court Western District of Tennessee 111 S. Highland Ave. Jackson, Tennessee 38301 (731) 421-9370	Honorable M. Ruthie Hagan United States Bankruptcy Court 200 Jefferson Avenue Suite 500 Nashville, TN 38103 (901) 328-3534
Mac Halcomb – U.S.B.C., N.D., Ala. (Ret.) 515 N. Churton St., Unit 208 Hillsborough, NC. 27278 (205) 238-0509	Henry E. Hildebrand, III P.O. Box 330818 Nashville, TN 37203 (615) 687-3213
Honorable Barbara D. Holmes United States District Court Fred D. Thompson U.S. Courthouse and Federal Building 719 Church Street Nashville, TN 37203 (615) 736-5164	Honorable Clifton R. Jessup, Jr. United States Bankruptcy Court P.O. Box 2775 Decatur, AL 35602 (256) 340-2700
Erica R. Johnson Erica R. Johnson Attorney at Law PLLC 8161 Highway 100, Ste 184 Nashville, TN 37221 Phone: (615) 347-5869	Hon. Nancy King United States Bankruptcy Court Middle District of Tennessee 701 Broadway, Suite 232 Nashville, TN 37203 (615) 736-5589
Vanessa Lantin – U.S.B.C., M.D., Tenn. United States Bankruptcy Court Middle District of Tennessee 701 Broadway, Suite 232 Nashville, TN 37203 (615) 736-5589	Edward D. Lanquist, Jr. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC 1600 West End Avenue, Suite 2000 Nashville, TN 37203 (615) 726-5581

Hon. Anne C. Martin Davidson County Chancery Court 1 Public Square, Room 406 Nashville, TN 37201 (615) 862-5700	John E. Murdock, III Bradley Arant Boult Cummings, LLP Roundabout Plaza 1600 Division Street, Suite 700 Nashville, TN 37203 (615) 252-2359
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Hon. Nicholas W. Whittenburg United States Bankruptcy Court Historic U.S. Courthouse 31 East 11 Street Chattanooga, TN 37402 Phone: (423) 752-5260	Phillip G. Young, Jr. Thompson Burton PLLC One Franklin Park 6100 Tower Circle, Suite 200 Franklin, TN 37067 (615) 465-6008

2025 MID-SOUTH COMMERCIAL LAW INSTITUTE FACULTY BIOS

KEVIN D. BALKWILL served as Disciplinary Counsel with the Board of Professional Responsibility for 12 years before returning to private practice and opening Ethics Law in the Fall of 2021. The firm focuses on attorney ethics, regulation and licensing. Mr. Balkwill previously litigated cases in a variety of practice areas in Memphis both as a member of a small firm and as a solo practitioner. He serves on the Ethics and Professional Responsibility Committee of the Tennessee Bar Association and is a member of the Association of Professional Responsibility Lawyers.

THE HON. SUZANNE BAUKNIGHT is Chief United States Bankruptcy Judge in the Eastern District of Tennessee, sitting in Knoxville. She also serves on the Bankruptcy Appellate Panel for the Sixth Circuit Court of Appeals and will assume chief duties on January 1, 2026. Before her appointment Judge Bauknight was Civil Division Chief of the U.S. Attorney's Office in the Eastern District of Tennessee. While Chair of DOJ's Civil Chiefs Working Group, she was appointed to the Advisory Committee of U.S. Attorney General Eric H. Holder, Jr.

Judge Bauknight earned her undergraduate and JD degrees, both magna cum laude, from the University of South Carolina. She was law clerk to S.C. Court of Appeals Judge C. Tolbert Goolsby, Jr., before moving to Knoxville to join the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz.

Judge Bauknight is a member of the Tennessee, South Carolina, and Knoxville Bar Associations and is an Emeritus Master of the Bench and past president of the Hamilton Burnett Chapter of the American Inns of Court. She served four years as an Associate Editor of the American Bankruptcy Law Journal. She recently was appointed by Chief Justice John Roberts to serve on the Federal Judicial Center's Bankruptcy Judge Education Advisory Committee. Judge Bauknight received the Knoxville Bar Association Law and Liberty Award in 2024 and the Janice M. Holder Access to Justice Award in 2023.

THE HON. WILLIAM "BILL" HOUSTON BROWN, RET. retired in 2006 as a United States Bankruptcy Judge for the Western District of Tennessee, and he had been designated to sit also in the Middle District of Tennessee, Southern District of Florida, Eastern District of Michigan and Western District of Kentucky. Judge Brown served a four-year term on the Bankruptcy Appellate Panel for the Sixth Circuit from 1999 through 2002. He received his law degree from the University of Tennessee, College of Law, where he was Order of the Coif. Judge Brown is a member of the American Bankruptcy Institute, having served on its Board and Executive Committee, and he was co-director of the American Bankruptcy Institute's Commission on Consumer Bankruptcy, which issued its final report in 2019. He is a Fellow in the American College of Bankruptcy. He is the author or co-author of several texts, including Bankruptcy Exemption Manual, 2005 Bankruptcy Reform Legislation with Analysis 1st and 2d editions, Bankruptcy and Domestic Relations Manual, The Law of Debtors and Creditors (all published by Thomson Reuters), and he is a principal contributing editor for Norton Bankruptcy Law and Practice 3rd. He is currently Adviser to the Academy for Consumer Bankruptcy Education, the education arm of the National Association of Chapter 13 Trustees.

MICHAEL E. COLLINS is a principal with Manier & Herod, practicing in the areas of bankruptcy law, surety law, and commercial litigation. Mr. Collins holds a B.A. in Economics from the University of Tennessee, a J.D. (magna cum laude) from Samford University and an M.B.A. (with honors) from Vanderbilt University. Mr. Collins' background in the insolvency context has encompassed many different roles, including Assistant U.S. Trustee with the U.S. Department of Justice, chapter 11 trustee, chapter 7 trustee, chapter 11 debtor's counsel, chapter 11 creditors' committee counsel, chapter 11 financial advisor to debtors/committees, and creditor's counsel. He is a Certified Business Bankruptcy Law Specialist by the American Board of Certification with over 30 years of bankruptcy and surety legal experience. He is also a Certified Insolvency and Restructuring Advisor ("CIRA") by the Association of Insolvency and Restructuring Advisors and received the Kroll Zolfo Cooper / Randy Waits CIRA Bronze Medal for achieving the third highest score nationally on the CIRA examination for 2006. He was formerly a business recovery consultant for PricewaterhouseCoopers, LLP, providing bankruptcy-related financial advisory services to a diverse set of companies, including Federal Mogul Corporation and Enron Corporation. Mr. Collins has been appointed chapter 11 trustee or receiver for over 25 operating businesses in cases. Mr. Collins is licensed to practice law in Tennessee, Texas and New York, and regularly represents clients in bankruptcy cases throughout the United States and in international insolvency cases. Mr. Collins is a past Chairman of the Mid-South Commercial Law Institute.

THE HON. JIMMY L. CROOM was appointed by the United States Sixth Circuit Court of Appeals as Bankruptcy Judge for the United States Bankruptcy Court for the Western District of Tennessee on March 20, 2013. Judge Croom's chambers and courtroom are located in the District's Eastern Division at Jackson, Tennessee. In January 2020, Judge Croom was appointed to a three-year term as a judge for the Bankruptcy Appellate Panel of the Sixth Circuit. He was appointed to a second three-year term with the BAP on January 1, 2023.

Judge Croom received his Bachelor of Science degree in Business Administration with a major in Accounting from the University of Tennessee (Martin) with high honors in 1983. He received his J.D. law degree from the Cecil C. Humphrey's School of Law at Memphis State University in 1986.

Judge Croom served as an Estate Administrator for the United States Bankruptcy Court for the Western District of Tennessee in 1987 until his appointment as an Attorney/Advisor in the Office of the United States Trustee for Region Eight in 1988. After serving in this capacity for seven years, Judge Croom was appointed Assistant United States Attorney for the Western District of Tennessee in 1995 where he served until his Judicial appointment. Judge Croom represented various federal agencies in civil matters before the United States Bankruptcy Court for the Western District of Tennessee, United States District Court for the Western District of Tennessee, and the Second, Fifth & Sixth Circuit United States Courts of Appeal. He also prosecuted criminal cases before the United States District Court for the Western District of Tennessee and the United States Sixth Circuit Court of Appeals.

THE HON. M. RUTHIE HAGAN was sworn in as a United States Bankruptcy Judge for the Western District of Tennessee on October 16, 2020. Prior to taking the bench, Judge Hagan was a partner in the Memphis office of Baker, Donelson, Bearman, Caldwell & Berkowitz, where she

served in the Bankruptcy and Commercial Restructuring Group. Prior to joining Baker Donelson, Judge Hagan practiced bankruptcy law as an associate attorney with Bass, Berry & Sims, PLC in Memphis. Judge Hagan graduated with honors from the University of Arkansas School of Law, where she served as Managing Editor of the Arkansas Law Review. While in law school, Judge Hagan was the recipient of the American Bankruptcy Institute Medal of Excellence. Judge Hagan has served as Co-Chair of the Bankruptcy Section of the Memphis Bar Association, Director of the Memphis Bar Association, Executive Council Member of the Tennessee Bar Association Bankruptcy Section, Director of the Mid-South Commercial Law Institute, Member of the American Bankruptcy Institute, and was named a Mid-South Rising Star in Bankruptcy & Creditor/Debtor Rights.

MAC HALCOMB was appointed as Clerk of Court for the U.S. Bankruptcy Court, Northern District of Alabama December 30, 2024. Prior to that he served as Chief Deputy Clerk (2016-2024); Staff Attorney for David Cottingham, Chapter 13 Standing Trustee for the Northern District of Alabama, Western Division; attorney with Zarzaur & Schwartz, PC; shareholder with Halcomb & Wertheim, PC; shareholder with Sirote & Permutt, PC; shareholder with Wood & Parnell, PC; and law clerk for Hon. Robert P. Bradley, Alabama Court of Civil Appeals. He represented creditors in his private practice. Mac received his B.S. in Business Administration from Samford University and his J.D. from Samford's Cumberland School of Law.

HENRY E. HILDEBRAND, III has served as Standing Trustee for Chapter 13 matters in the Middle District of Tennessee since 1982 and as Standing Chapter 12 Trustee for that district since 1986. He also is of counsel to the Nashville law firm of Farmer Purcell White & Lassiter, PLLC. Mr. Hildebrand graduated from Vanderbilt University and received his J.D. from the National Law Center of George Washington University. He is a fellow of the American College of Bankruptcy and the Nashville Bar Foundation. He is Board Certified in consumer bankruptcy law by the American Board of Certification and serves on its faculty committee. He is Chairman of the Legislative and Legal Affairs Committee for the National Association of Chapter 13 Trustees (NACTT). He is on the Board of Directors for the NACTT Academy for Consumer Bankruptcy Education, Inc. and is an adjunct faculty member for the Nashville School of Law and St. Johns University School of Law. In addition, he served as a commissioner to the American Bankruptcy Institute's Commission on Consumer Bankruptcy.

THE HON. BARBARA HOLMES was appointed as a U.S. Magistrate Judge for the Middle District of Tennessee on August 1, 2015. Prior to her appointment, Judge Holmes practiced law for almost 30 years in Nashville, representing clients in commercial and bankruptcy litigation in federal and state courts and providing turn-around and restructuring advice (sometimes through a chapter 11 bankruptcy filing) for troubled business in all kinds of industries. Among the kinds of business for which she assisted in the restructuring or structured sale were multiple regional coal mining operations, regional hospital systems, an after-market printer ink and ribbon manufacturer, hospitality franchises (restaurant and hotel), specialty retail businesses, and freight transportation and related services companies, each with its own unique considerations, including state and federal regulatory oversight, vendor and customer contract negotiations and disputes, employment discrimination claims, anti-trust concerns, and intellectual property issues. Throughout her career, Judge Holmes represented clients in custody and other juvenile law matters on a *pro bono* basis, employment cases, emancipation proceedings, receiverships, family law matters, and administrative proceedings. She also worked on significant cases involving

environmental law and franchise law issues. Judge Holmes was previously a Rule 31 mediator and served as a mediator and arbitrator in a variety of business, bankruptcy, and other disputes. She also previously served as a Hearing Committee member for the Tennessee Board of Professional Responsibility, and on a number of hearing panels (including as chair) for disciplinary complaints. Judge Holmes is a former director and past president of the Mid-South Commercial Law Institute and a former director and past president of the Nashville Bar Association. She is a Master with the Harry Phillips American Inn of Court. Judge Holmes is a fellow of the Tennessee Bar Foundation, for which she previously served as Treasurer and as Chair of the Board of Trustees. She is also a fellow of the American Bar Foundation and of the Nashville Bar Foundation. Judge Holmes previously served on the Tennessee Bar Association Board of Governors and is a past chair of the Executive Council for the TBA Bankruptcy Law Section and a past chair of the TBA Public Education Committee. Judge Holmes is a frequent producer and lecturer on a broad range of continuing legal education topics, previously chaired the CLE Committee of the Nashville Bar Association and chaired a special task force on continuing legal education for the NBA. She is also a recipient of the Nashville Bar Association's CLE Award for exceptional service to the NBA's CLE program. Judge Holmes was previously a Juvenile Court referee, where she heard cases involving truancy, dependency and neglect, and private custody and visitation disputes. She also chaired a statewide commission on juvenile justice issues for the Tennessee Bar Association.

THE HON. CLIFTON R. JESSUP, JR. was appointed the United States Bankruptcy Judge for the Northern District of Alabama, Northern Division on March 2, 2015. He was formerly a principal shareholder in the Dallas office of the international law firm of Greenberg Taurig LLP where he concentrated his practice in business reorganization and bankruptcy. During his 35 plus years of bankruptcy-related practice before taking the bench, Clifton represented secured creditors, unsecured creditors, committees, equity holders, debtors, and trustees in federal bankruptcy cases in over 37 states and Puerto Rico. He also represented purchasers of assets in bankruptcy cases, and served as examiner and mediator in many cases.

ERICA R. JOHNSON has served as a member of the Chapter 7 trustee panel for the Middle District of Tennessee since 2017. She is the sole member of Erica R. Johnson, Attorney at Law, PLLC, where she serves as attorney for the trustee and performs the duties of a trustee assistant. Ms. Johnson began her bankruptcy career in 2006 as the trustee assistant to Samuel K. Crocker, continuing in that role until his appointment as United States Trustee for Region 8 in 2011. She then worked with Susan R. Limor as both trustee assistant and attorney for the trustee, eventually becoming a partner at Limor & Johnson, Attorneys at Law, until Ms. Limor’s retirement from the panel in 2017. Ms. Johnson earned her undergraduate degree from the University of South Carolina and her J.D. from the Nashville School of Law. In addition to her professional commitments, she serves on the Board of Directors for the Mid-South Commercial Law Institute and is the treasurer of the Parent Teacher Organization at her children’s school, Harpeth Valley Elementary School.

THE HON. NANCY B. KING was sworn in as a United States Bankruptcy Judge for the Middle District of Tennessee in 2024.

Prior to her appointment, Judge King, a native Nashvillian, graduated from the University of Memphis, Cecil C. Humphreys School of Law. After graduation, she clerked for the Honorable

Hewitt P. Tomlin on the Tennessee Court of Appeals. Following that clerkship, she served for many years as a career judicial law clerk to the Honorable George C. Paine, II (retired) and the Honorable Randal S. Mashburn. Following her clerkships, she was a member of the law firm EmergeLaw, PLC where she represented small and middle market businesses and their owners in debt workouts, Chapter 11 reorganizations, Subchapter V restructurings, also serving as counsel for chapter 11 unsecured creditors' committees and consumer creditor's counsel in bankruptcy courts throughout Tennessee.

Judge King has authored numerous bankruptcy related articles and has been a presenter at seminars focused on bankruptcy law and practice. She has served on numerous law and non-law related boards, and since 2017, has served as the Executive Director of a nonprofit entity that develops affordable housing in and around Middle Tennessee.

VANESSA LANTIN is the Clerk of Court, U.S Bankruptcy Court for the Middle District of Tennessee.

Vanessa Lantin is an experienced legal professional and current Clerk of Court for the U.S Bankruptcy Court for the Middle District of Tennessee, with more than 20 years of expertise in federal judiciary policy, administrative operations, and corporate and insolvency law. She previously served as a Senior Attorney and Special Advisor at the Administrative Office of the U.S. Courts, where she advised U.S. bankruptcy judges and led high-level initiatives related to legislation, case management, and judicial resource planning. After obtaining an undergrad degree from Wake Forest University, School of Business, and a law degree from the University of Memphis, Vanessa began her legal career as law clerk to Judge David S. Kennedy in the Western District of Tennessee.

Her career spans legal consulting for international small businesses, project leadership on national judiciary reforms, and academic instruction. A seasoned communicator and published author, her work has appeared in the Journal of Bankruptcy Law and Practice and the University of Memphis Law Review.

Fluent in English, German, and French, Vanessa is recognized for her strategic insight, legal expertise, and commitment to excellence in public service.

EDWARD D. LANQUIST, JR. is an AV rated lawyer who focuses his practice on patent and trademark litigation, intellectual property counseling, and trademark prosecution. In addition to litigating more than one hundred and fifty cases, Mr. Lanquist has filed over one thousand trademark registration applications, over 150 patent applications, and performed in excess of 2,300 trademark clearance searches. He has litigated and performed appellate work in cases involving patent infringement, trademark infringement, trade dress infringement, right of publicity, copyright infringement, design patent infringement, and trade secret misappropriation cases. Mr. Lanquist counsels clients on the economic benefits and implications of intellectual property protection and litigation. Ed received his J.D., with Honors, University of Tennessee, 1988 and his B.S., Civil Engineering, with Honors, University of Tennessee, 1985. Ed is General Counsel for the Tennessee Bar Association. Ed is a Past President and a member of the Board of Directors of

the Nashville Bar Association. He is a former Chairman of the American Bar Association, Young Lawyers Division, Patent, Copyright and Trademark Committee. Ed serves on the Executive Committee of the Tennessee Bar Association, Intellectual Property Committee. He is a past President, Tennessee Intellectual Property Law Association, a past Treasurer, Nashville Bar Association, a past Chair, Nashville Bar, Intellectual Property Committee, a past Chair, Nashville Bar Association, Continuing Legal Education Committee, a past Chair, Nashville Bar Association, ad hoc committee for online continuing legal education. Ed is the past Chair of the Nashville Shakespeare Festival, past Chair of the Mid-South Chapter of the Multiple Sclerosis Society, past Chair and Board Member of the Belcourt Theatre - Nashville's art house theatre, a Past Board Member for the Nashville Capital Network, a Board Member of the Arts and Business Council, a Board Member of the Nashville Technology Council, a Board Member of Hand on Nashville, a Board Member of New Dialect, and a Board Member of the Arts and Business Council.

HON. ANNE C. MARTIN is judge of Part II of the Chancery Court of Davidson County, Tennessee. Effective November 1, 2019, the Tennessee Supreme Court appointed Chancellor Martin as the Business Court Docket judge for the State of Tennessee. She is also the Presiding Judge of the judicial district.

Chancellor Martin earned a B.A. from Smith College in 1989 and her J.D. from Vanderbilt University School of Law in 1992. She began her practice with the law firm of Dodson, Parker & Behm, P.C. In July 2004 she joined the law firm of Bone McAllester Norton PLLC where she concentrated her practice in the areas of commercial litigation and employment law. She represented both employers and employees of many different companies, as well as individuals with a diverse array of business problems. As a lawyer, Chancellor Martin was AV rated and frequently recognized by the Best Lawyers in America and Mid-South Super Lawyers organizations for her work in the area of labor and employment. Chancellor Martin is currently a member and President-Elect of the American College of Business Court Judges.

Chancellor Martin has been an active participant, board member and officer of many Nashville non-profits and bar associations over the years. She loves the law and attributes her love for the profession to the excellent legal mentorship she received as a young lawyer. She enjoys being able to share the skills she learned from her mentors with aspiring students. To this end, Chancellor Martin was an Adjunct Professor at Belmont University College of Law where she taught a course in client counseling. She is currently an Adjunct Professor at the Nashville School of Law teaching sales and secured transaction courses.

JOHN E. MURDOCK, III is a partner in the Nashville office of Bradley Arant Boult Cummings LLP. He received his J.D. from Vanderbilt University Law School in 1981, where here was inducted to the Order of the Coif. John's law practice includes commercial law generally and the deployment and recovery of debt and equity capital in a wide range of industries and transactions. John is listed in Chambers USA for his Banking and Finance Practice; in Best Lawyers in America for Nashville Banking and Finance Law; and is a Fellow of the American College of Commercial Finance Lawyers.

WILLIAM L. NORTON III is a Member of the law firm Bradley Arant Boult Cummings LLP, 1221 Broadway, Suite 2400, Nashville, Tennessee, 37203 (615-252-2397). He graduated from Vanderbilt University (B.A., 1975; J.D., 1982) and practices in the commercial finance area and

focuses primarily in creditor's rights and insolvency law. Mr. Norton is a Fellow with the American College of Bankruptcy. He teaches bankruptcy law and secured transactions as an Adjunct Professor at Vanderbilt University School of Law and is the Editor in Chief for Norton Bankruptcy Law and Practice 3d (Thomson-Reuters) and Co-Author of the Creditor's Rights Handbook (Thomson-Reuters 2024) and Exemption Handbook (Thomson-Reuters 2025). He serves as Institute Manager for Norton Institutes on Bankruptcy Law, which has conducted over 100 seminars on bankruptcy law, and has provided monthly webinars for West Legal Ed. for over twenty years. Mr. Norton is Past President of the American Board of Certification and is a Director Emeritus. He is a Past President of the Tennessee Turnaround Management Association and in 2016, he received the Outstanding Turnaround Professional Award from the Tennessee TMA Chapter. Mr. Norton is a Past Board Chair of the Mid-South Commercial Law Institute and a Past First Vice President of the Nashville Bar Association. He is an approved Rule 31 mediator by the Tennessee Supreme Court, and is the current Board Chair of the Nashville Conflict Resolution Center where he also is a volunteer who provides over 50 hours per year of pro bono mediation services to pro se litigants in Davidson County General Sessions Court.

AMANDA STANLEY is counsel with the Nashville office of Bass, Berry & Sims PLC. Her practice focuses on commercial lending and secured transactions with an emphasis on middle market transactions. She has represented agent banks and lenders in revolving credit and term loan facilities to both public and private companies in a variety of industries; advised a variety of borrowers, both public and private entities, in corporate financings, including syndicated senior revolving credit and term loan facilities, both secured and unsecured, and real estate financings. She graduated from Georgetown University and Emory University School of Law.

AARON TODRIN is the President of Second Wind Consultants, Inc. ("SWC"), a business consultancy that specializes in transaction-based reorganizations. SWC has transformed Article 9 of the Uniform Commercial Code from a liquidation tool to a business preservation model that operates as an efficient and effective alternative to Chapter 11 reorganizations, ABCs, or other turnaround methodologies. Businesses are preserved through the transaction, thereby maximizing value for both entering and exiting lenders, creating synergy to replace adversity and posturing.

Aaron is also an active attorney – he practiced in the Federal Bankruptcy Courts in Boston, Massachusetts for six years, which is the source of his first-hand exposure to certain inefficiencies of the Bankruptcy Code for businesses operating in the lower middle market. There is often a better way to help companies facing unsupportable debt, and that is through Article 9. SWC has conducted over 2,000 Article 9 Reorganizations in the last 17 years, thereby saving exponentially more jobs while creating value for and in the American economy.

KARA M. WARD is a policy advocate shareholder in Baker Donelson's Washington, D.C., office. She has more than 15 years of experience in financial services, public policy, and regulatory law. Ms. Ward concentrates her practice on advising financial institutions, FinTechs, consumer advocacy groups, non-profits, and trade associations, utilizing her deep knowledge of complex intergovernmental matters at the intersection of financial services law and public policy to advance clients' objectives on Capitol Hill, within regulatory agencies, and across the Executive Branch.

Ms. Ward received her J.D. from George Washington University Law School and her B.A., with

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THE HON. NICHOLAS W. WHITTENBURG is a bankruptcy judge for the United States Bankruptcy Court for the Eastern District of Tennessee. Judge Whittenburg has served in the Southern (Chattanooga) and Winchester Divisions since June 2015. Before his appointment Judge Whittenburg was a member of Miller & Martin PLLC. While at that firm he was the chair of that firm's Bankruptcy Practice Group.

Judge Whittenburg earned his B.A. in economics magna cum laude from Vanderbilt University in 1987. He received his juris doctorate, with distinctions, in 1990 from Emory University School of Law and is a member of the Order of the Coif. He was admitted to both the Tennessee and Georgia Bars. Judge Whittenburg is also a Master of the Bench of the American Inns of Court.

PHILLIP G. YOUNG, JR. is a Partner at Thompson Burton PLLC. Phillip's practice specializes in bankruptcy, receivership, creditors' rights, commercial loan workouts, as well as complex commercial litigation. Phillip has broad experience representing parties in all manners of insolvency cases. As part of his creditors' rights practice, Phillip has represented financial institutions, corporations and governmental entities in complex workouts, bankruptcies, receiverships, state and federal court litigation, and judgment enforcement. Phillip has also represented large corporate debtors in chapter 11 bankruptcies, chapter 7 bankruptcies, receiverships, and outside of court debt restructuring. In addition to creditor and debtor work, Phillip is frequently retained to represent court-appointed bankruptcy trustees and receivers in evaluating, and pursuing, litigation assets, and has been appointed by various state courts and the United States District Court for the Middle District of Tennessee to serve as receiver of assets

The breadth of Phillip's experience (from creditor to debtor to trustee) enables him to examine complex legal problems from all angles and craft legal strategies and solutions that are the most effective and efficient for his clients.

Prior to joining Thompson Burton, Phillip was an associate at Bass, Berry & Sims PLC (2000 – 2008) and a founding member of Garfinkle, McLemore & Young, PLLC.

Phillip is very active in the community in Columbia, Tennessee, where he lives with his wife Brandy and their two sons, Phillip III and Derek. Phillip has previously served as Chairman of the board of directors of Columbia Academy, a K-12 private school with campuses in Columbia and Spring Hill. He has combined his passion for Columbia Academy with his passion for youth football by coaching and serving on the board of directors for the Columbia Academy Youth Football League (in which both of his sons have played). Phillip also previously served on the board of Nashville Christian School, Main Street Columbia, and the Mid-South Commercial Law Institute.

In his free time, Phillip enjoys attending his sons' fine arts performances, restoring his historic home, and attending college and NFL football games. Phillip is a member of the West 7th Street Church of Christ in Columbia, where he frequently leads Bible studies for college students and young families.

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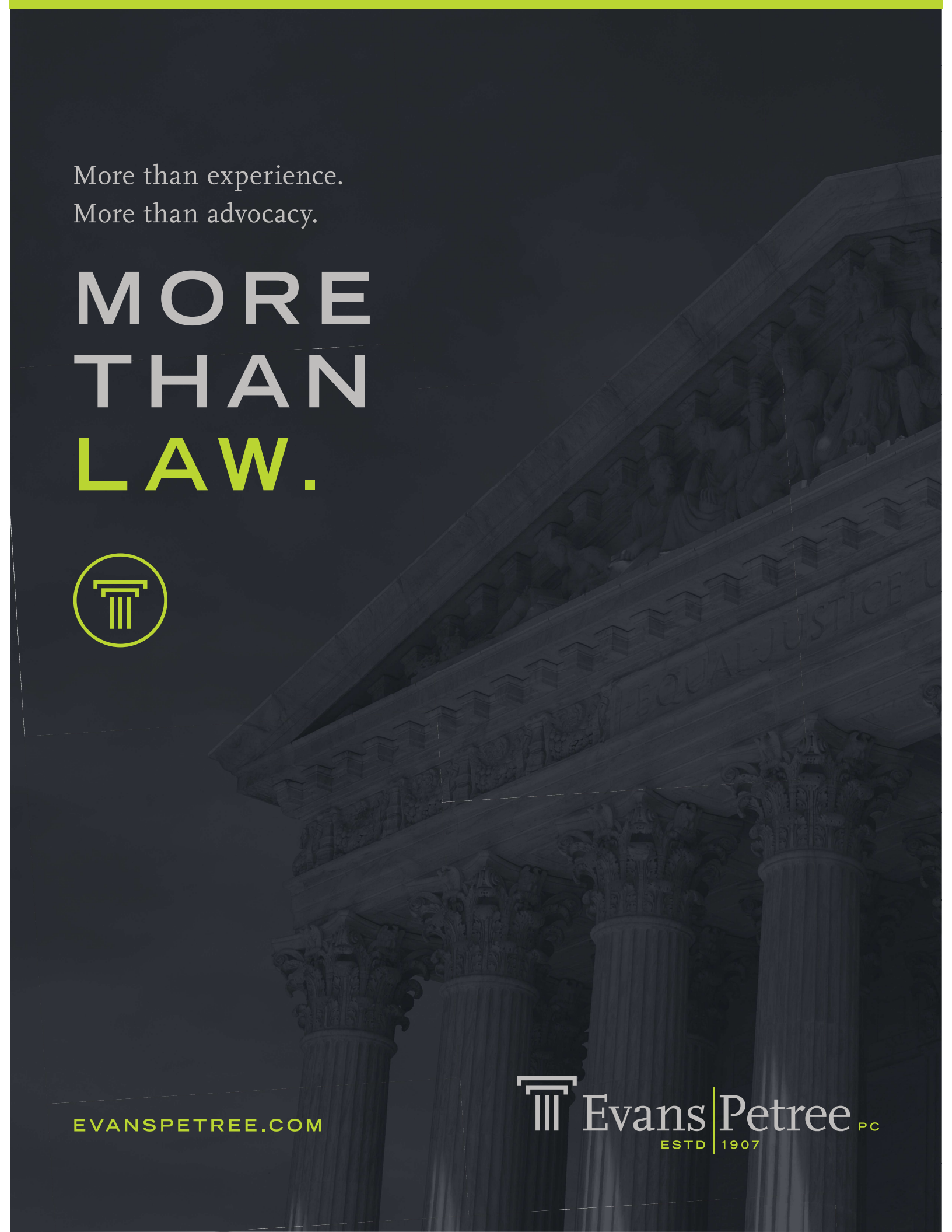
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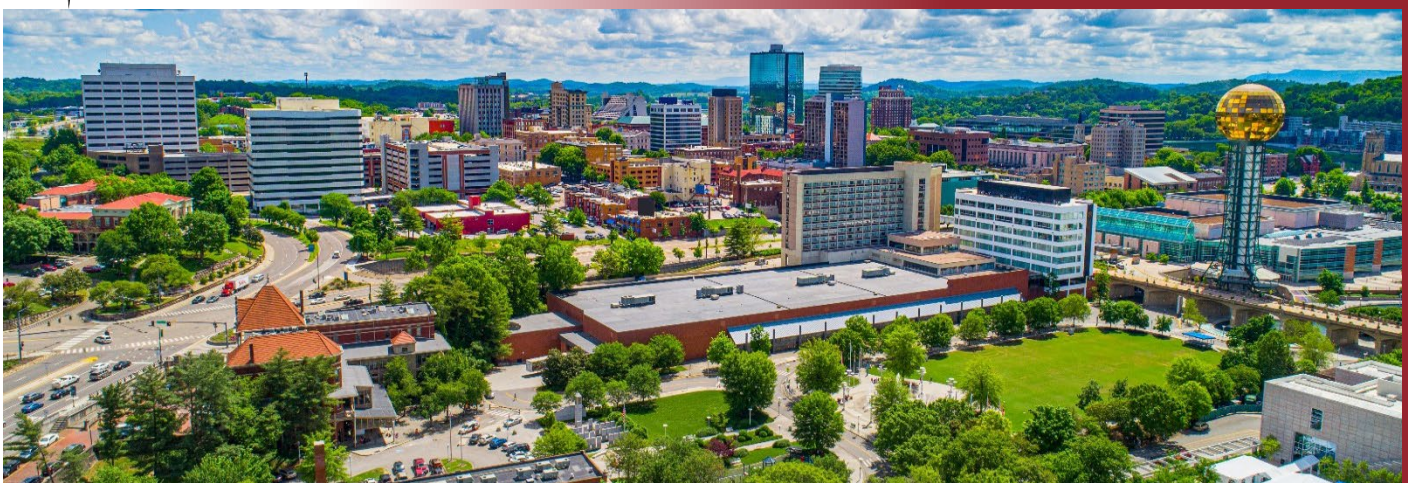

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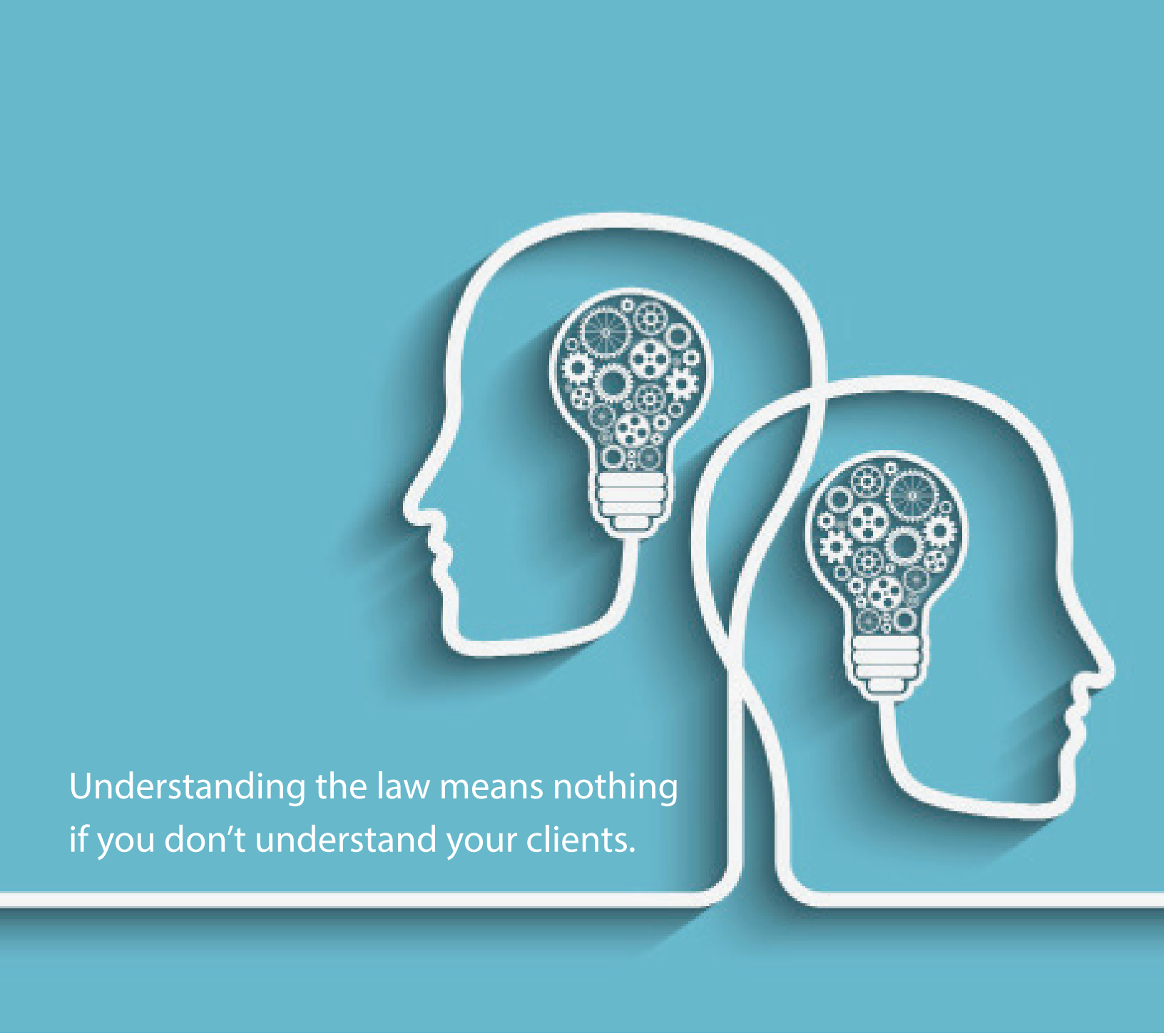

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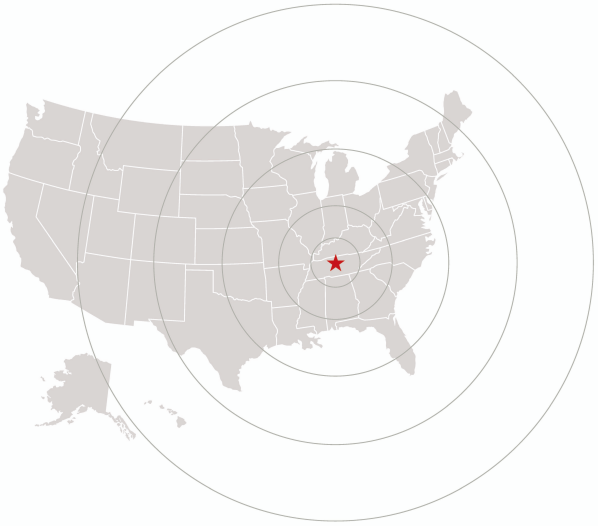

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A. VOLUNTARY PETITION

i. ***In re Whittaker Clark & Daniels, Inc.*** **152 F.4th 432 (3rd Cir. 2025)**

Issue: Whether directors could file Chapter 11 when receiver had been appointed by state court.

Holding: Under New Jersey law and settled choice-of-law principles, South Carolina court's prepetition order appointing a receiver for corporate Chapter 11 debtor did not strip debtor's board of directors of the authority to file for bankruptcy. In order to displace board's control over, inter alia, the company's privileges, franchises, and assets, the South Carolina receiver needed to move for, and be granted, recognition in New Jersey and appointment of an ancillary receiver, but it did not do so, meaning that board retained authority over those corporate decisions reserved to it by New Jersey law, including the decision whether to reorganize by filing for bankruptcy, and rather than extending to displace board's authority over corporate affairs, South Carolina receivership order only purported to give receiver control of debtor's "assets" and power to "take any and all steps necessary to protect the interests of [debtor] whatever they may be."

ii. ***In re 530 Donelson, LLC*****, 660 B.R. 887 (Bankr. M.D. Tenn. 2024)**

Issue: Whether state court receivership had authority to commence Chapter 11 case of limited liability company.

Holding: State court receivership orders that contained no express language addressing members' right and authority to file bankruptcy did not preclude member of Chapter 11 debtor limited liability company from filing petition on behalf of debtor. The general language granting broad powers to a state receiver or limiting authority of existing management was not enough to deprive debtor of its right and authority to file bankruptcy. General language granting broad powers to a state receiver or limiting authority of existing management is not enough to deprive a debtor of its right and authority to file bankruptcy.

B. INVOLUNTARY PETITIONS

i. ***In re Sabadash*****, 672 B.R. 442 (Bankr. C.D. Calif. 2025)**

Issue: Whether partner of partnership had standing to bring involuntary petition against partnership

Holding: Alleged partner of alleged partnership, who had filed involuntary bankruptcy petition against the partnership which was contested by partnership's other alleged partner, failed to establish that his claims were beyond bona fide dispute. Evidence proffered by alleged partner to establish existence of alleged debtor, the partnership, was replete with inconsistencies and contradictions, including his failure to obtain written memorialization of other alleged partner's purported offer of guaranteed minimum income of $4 million per year if he moved from California to Russia to become business partners, purported partnership minutes that were prepared some six years after the alleged partners supposedly agreed orally to become partners, inconsistent state-court testimony of alleged partner concerning the partnership's business interests and his living conditions while in Russia, and recognition judgment entered against the partnership some six years

earlier that remained unenforced. Furthermore, dismissal of involuntary bankruptcy petition was warranted under Code § 305(a) governing abstention, where the partnership purportedly held an interest in certain real property and the Bankruptcy Court previously granted a petition for recognition of a foreign proceeding pending before the Royal Court of Jersey in a different debtor's bankruptcy case in which ownership of that same property was also at issue.

ii. ***Stursberg v. Morrison Sund PLLC*, 112 F.4th 556 (8th Cir. 2024)**

Issue: Whether debtor's motion for damages against petitioning creditor should be granted.

Holding: Congress intended that the federal court that dismisses an involuntary case have exclusive jurisdiction to enforce the debtor remedies provided in the section of the Bankruptcy Code governing involuntary cases, including remedies for bad-faith and fraudulent filings. Unless an involuntary petition has been dismissed with the parties' consent, and without the debtor's waiver of the right to judgment Code § 303 governing involuntary cases, the Bankruptcy Court, based upon the totality of the circumstances, may, in its discretion, award attorney's fees and costs under the remedies provision for a "best interests" dismissal of an involuntary petition under the abstention section of the Code. In this case, claim preclusion barred alleged debtor's post-dismissal action in federal district court against petitioning creditor seeking damages for its alleged bad-faith filing of the involuntary bankruptcy petition against him, where the Bankruptcy Court had denied alleged debtor's motion for attorney's fees and costs under the remedies provision of the section of the Bankruptcy Code governing involuntary cases for the following reasons: (ii) the Bankruptcy Court's order was a final order, (iii) debtor did not appeal the order, and (iv) the order governed alleged debtor's subsequent proceeding between the same parties arising out of the same operative facts. If, instead, alleged debtor had successfully appealed the Bankruptcy Court's order, he could have then brought "tort claims" for damages under the Code's involuntary-cases remedies provision in the bankruptcy forum.

iii. ***In re SA Hospital Acquisition Group*, 660 B.R. 97 (D. Del. 2024)**

Issue: Whether motion to dismiss insolvency proceeding by receiver appointed in state court insolvency proceeding should be granted.

Holding: Receiver appointed in state court over alleged debtor had standing to request dismissal or abstention in involuntary Chapter 11 proceeding. While petitioning creditors asserted that receiver was a mere custodian, not included in Bankruptcy Code's list of parties-in-interest, and thus lacked a direct legal interest in the case, receiver was in fact more than a custodian because the state court had placed receiver in charge of operating alleged debtor's business and as sole authority to manage actions of alleged debtor, and had enjoined co-managing members from controlling and directing alleged debtor's actions. Also, filing a motion seeking excusal from turnover requirement under Code § 543 was not prerequisite for receiver to have standing to request dismissal or abstention. Further, answer purportedly filed on behalf of alleged debtor in involuntary Chapter 11 case was unauthorized and did not preclude receiver from requesting dismissal or abstention in involuntary proceeding because receiver was custodian of alleged debtor's assets and was charged with operating alleged debtor's business and performing management functions for alleged debtor, and receiver had been empowered to defend all actions, such as an involuntary petition, for alleged

debtor. Bankruptcy Court did not abuse its discretion in evaluating the totality of the circumstances and determining that dismissal of involuntary Chapter 11 petition was appropriate based on petitioning creditors' bad faith. Court noted that the involuntary filing was ultimately driven by a few parties' dissatisfaction with certain decisions by state court receiver, and to the extent that stakeholders were unhappy with decisions and priorities of the receiver, redress was best directed to the receiver and state court because the receiver had been in place for months under the supervision of a court of competent jurisdiction and there was little or no discernible benefit that would accrue from stopping that process and starting from ground zero in a bankruptcy case.

C. AUTOMATIC STAY

i. ***In re Tommy's Fort Worth, LLC*, 671 B.R. 712 (Bankr. N.D. Tex. 2025)**

Issue: Whether actions taken by debtor's owner violated the automatic stay.

Holding: Chapter 11 debtor-limited liability companies' (LLC) president, who also was each debtor's direct or indirect owner and had personally guaranteed the debt for their watercraft dealerships' floor plan facility, knowingly and willfully violated the automatic stay by asserting claims against boat manufacturer and its former CEO, and by requesting leave of court to file proposed counterclaim against debtors' floor plan financer, in separate litigation. Claims were property of debtors' estates and despite having been put on notice that claims against manufacturer and CEO violated the stay, president did not address trustee's concerns or seek comfort order from Bankruptcy Court but, instead, doubled down by filing amended complaint, and, although president obtained carve-out in cash collateral order to assert his claims against financer, he also attempted to assert estate causes of action, such that his efforts to pursue the claims were not the result of oversight or mistake

ii. ***In re Morozov*, 671 B.R. 326 (M.D. Fla. 2025)**

Issue: Whether automatic stay should be annulled in reopened Chapter 11 case.

Holding: Factors considered in determining whether annulment of automatic stay is warranted include whether: (1) creditor had actual or constructive knowledge of the bankruptcy filing, (2) debtor acted in bad faith, (3) grounds would have existed for modification of the stay if a motion had been filed before the violation, (4) the denial of retroactive relief would result in unnecessary expense to creditor, and (5) creditor has detrimentally changed its position on the basis of the action taken. In this case, annulment of the automatic stay, on unscheduled creditor's post-discharge motion, was warranted, where Chapter 11 debtor's conduct throughout the bankruptcy proceedings, including his failure to list creditor's prepetition commercial loans, which debtor had personally guaranteed, indicated bad faith, debtor's failure to mitigate reflected a lack of respect for the judicial process, and without an annulment, years of litigation, as well as third-party settlements, would be undone, which would be both inequitable to creditor and would almost certainly lead to the same results, but with unnecessary delay and substantial expense.

iii. ***In re Wythe Berry Fee Owner LLC*, 662 B.R. 36 (Bankr. S.D.N.Y 2024)**

Issue: Whether creditor's notice of retraining notice under New York law was a violation of the automatic stay when given after confirmation of the Chapter 11 plan but before the Effective Date of the Plan.

Holding: Restraining notice served pursuant to New York law on Chapter 11 debtor by judgment creditor of claimant, after confirmation date but before effective date of debtor's plan incorporating settlement requiring debtor to pay $650,000 to claimant, by which restraining notice judgment creditor, which held final, non-appealable, unsatisfied $8.5 million judgment against claimant, purported to require debtor to withhold its payment to claimant, was valid and enforceable in the case, and required debtor to withhold payment pending further order of Bankruptcy Court for the following reasons: (i).the restraining notice did not violate the automatic stay, (ii) the debtor did not object to complying with restraining notice, (iii) the confirmed plan was effective and the required distributions were being made, and (iv) the restraining notice was "one-off" situation that would impose little administrative burden and did not interfere with use of debtor's property or assets other than as required by law, or with rights or protections afforded by Bankruptcy Code.

iv. ***In re Windstream Holdings, Inc.*, 105 F.4th 488 (2d. Cir. 2024)**

Issue: Whether advertising by debtor's competitor violated the automatic stay.

Holding: The Second Circuit assessed whether a competitor's advertisements were a violation of the automatic stay. The defendant, Charter, sent mailers targeting areas likely to include customers of the debtor, Windstream. The mailer's design appeared similar to communications from Windstream and contained text that called into question Windstream's ability to continue to provide communication services to its customers as a result of its bankruptcy case.

The Second Circuit first determined that the appropriate standard for whether Charter could be found in contempt under Code § 105(a) for a violation of the automatic stay was the *Taggart* standard applied by the Supreme Court in a case examining a violation of the discharge injunction. This standard examines whether there is a "fair ground of doubt as to whether the order barred the [party's] conduct." Before looking to whether a fair ground of doubt existed as to whether Charter's actions violated the automatic stay, the court first determined that the customer contracts and goodwill that Windstream alleged Charter "exercised control" over through its advertising activity were property of Windstream's estate. The court next found that Charter's advertising campaign did not constitute an exercise of control for purposes of the automatic stay. The court distinguished litigation or other legal action that would destroy or transfer control of a debtor's property from activities that would influence customer behavior. Further, the advertisements did not constitute interference with the administration of Windstream's estate because it was only factually likely and not legally certain that the advertisements would interfere with the administration of Windstream's estate.

v. ***In re Morgan*, 659 B.R. 461 (Bankr. D.S.C. 2024)**

Issue: Whether cause exists for secured creditor to be granted relief from stay and dismissal of Chapter 11 case.

Holding: Because the Bankruptcy Code provides no definition of what constitutes "cause" for relief from the automatic stay, courts must determine when discretionary relief is appropriate on a case-by-case basis. In this case, debtor's proposed Chapter 11 plan was not feasible, as required for confirmation, thus warranting relief from automatic stay for creditor to pursue foreclosure action, where debtor's sources of income listed in his schedules, including Social Security and rental income, were clearly inadequate to fund the plan for the following reasons: (i) his schedules reflected significantly negative net monthly income without even accounting for payments on loan, (ii) there was no indication that debtor's company could provide sufficient, or any, funding for the plan when debtor had retired a number of years ago and failed to offer sufficient information regarding how the company operated or who the clients/investors were, and (iii) letters from potential reverse mortgage lenders did not indicate that debtor's financing was likely to be approved. However, dismissal of debtor's Chapter 11 case for "cause" based on bad faith filing was not warranted, despite objective futility and lack of feasibility of debtor's proposed plan, which may have been more the result of debtor's failure to deal with reality and "terminal euphoria."

D. PROPERTY OF THE ESTATE

i. ***In re Prime Core Technologies, Inc*., 2025 WL 2027499 (Bankr. D. Del. July 18, 2025)**

Issue: Whether cryptocurrency held by debtors was property of estate.

Holding: Cryptocurrency and fiat were hopelessly commingled in accounts and therefore were property of Chapter 11 debtors' estates that could be distributed to satisfy general unsecured claims against debtors pursuant to confirmed plan. The creditors' assets could not be separately identified, segregated, traced or otherwise specifically identified.

ii. ***In re Palm Springs II, LLC*, 106 F.4th 406 (5th Cir. 2024)**

Issue: Whether Bankruptcy Court could order contractor to turn over personal property relating to construction of hotel property when the construction contract had been terminated when the construction was only half complete.

Holding: The Bankruptcy Court had the power to order the sale of the debtor's assets. Palm Springs, L.L.C. ("Palm Springs") defaulted on a loan from Hall Palm Springs, L.L.C. ("Hall") in connection with construction of a hotel. Palm Springs conveyed the property to Palms Springs II, L.L.C. ("RPS") in order to avoid foreclosure and Hall subsequently released Palm Springs from its loan obligations. RPS failed to complete construction of the hotel and filed for bankruptcy, which, after failing to sell the property at auction, the Bankruptcy Court permitted RPS to sell its assets to Hall. The appellant, SR Construction, who had been hired to build the hotel but terminated by Palm Springs when construction was halfway complete, appealed to the Fifth Circuit arguing that the Bankruptcy Court did not have jurisdiction to order the sale by RPS of its assets to Hall and arguing that Hall never obtained title to certain personal property included in the sale. The Fifth Circuit rejected the appellant's arguments holding that the Bankruptcy Court had jurisdiction to enter a turnover order because that order interpreted and enforced the sale order and the turnover order was integral to and inseparable from RPS's bankruptcy making it a core matter within the bankruptcy

court's authority. Finally, the Fifth Circuit upheld the Bankruptcy Court's finding that title to the personal property had been transferred because the parties followed the requirements for transfer set forth in their underlying contract. The scope of the sale order included hotel and "all related assets to be purchased" by affiliate pursuant to terms of purchase agreement, which included furnishings, equipment, and "other tangible personal property of [debtor]," and thus the sale order also required that affiliate actually receive the personal property, and turnover order was within scope of those terms. Hotel-related personal property was part of Chapter 11 debtor's bankruptcy estate, and title to it was conveyed via order by which Bankruptcy Court approved credit-bid sale of debtor's assets, including real property, partially completed hotel, and personal property, to corporate affiliate of debtor that had financed hotel project. Under California law, plain terms of construction contract between company hired to build hotel and hotel's original owner, which was debtor's predecessor-in-interest, did not require owner to pay company in full before owner could obtain title to personal property, but provided that owner obtained title in increments each time it tendered payment to company for specified materials. Thus when the parties followed course of performance outlined in contract the title to personal property at issue transferred to owner. Title later passed from owner to debtor via bill of sale, and affiliate obtained title when it purchased debtor's assets "as is" via court-approved sale. Accordingly debtor could force turnover of personal property.

iii. ***In the Matter of South Coast Supply Co.*, 91 F.4th 376 (5th Cir. 2024)**

Issue: Whether avoidance actions are property of the estate.

Holding: The Fifth Circuit, joining the Eighth and Ninth Circuits, held that preference claims arising under Code § 547 may be sold. The Chapter 11 debtor in this case had filed a preference action against its former CFO, seeking to avoid over $300,000 of allegedly preferential transfers. As part of its Chapter 11 plan, the debtor assigned its interest in the pending preference action to its only secured creditor. Recognizing that the issue was one of first impression in the Fifth Circuit, the Court held that preference claims qualify as "property of the estate" under Code §§ 541(a)(1) and (a)(7) and therefore could be sold by a debtor-in-possession under Code § 363(b)(1). In addition to the statutory language itself, the Court relied on cases from the Eighth and Ninth Circuits holding that preference claims are property of the estate and reasoned that such an approach best allows the trustee to maximize the value of the bankruptcy estate.

iv. ***In re Whittaker, Clark & Daniels*, 663 B.R. 1 (Bankr. D.N.J. 2024)**

Issue: Whether debtor could stay claims against non-debtor entity that had purchased the assets of the debtor on the grounds that the "successor liability claims" against the purchaser were property of the debtor's estates.

Holding: Under Third Circuit's *Emoral* test, 740 F.3d 875, California "successor liability claims" against non-debtor entity that had purchased most of Chapter 11 debtors' operating assets or other non-debtor third parties were property of debtors' bankruptcy estates. Successor liability claims were "general" to debtors' estates, not "particularized" or "personal," as whether premised on successor liability, alter ego, or some similar theory, claims were based entirely on debtors' actions and conduct, not on any injury that could be traced to non-debtors, which were implicated solely

through their business dealings with debtors, bulk of such claims fell within parameters of Code § 541(a) broadly defining property of the estate, and insofar as claims fell within "strong-arm" provision of Code § 544(a)(1) conferring on trustee the rights and powers of certain hypothetical creditors, they were estate property as interests acquired by the estate postpetition.

E. EMPLOYMENT OF PROFESSIONALS AND RELATED ISSUES

i. ***In re Whitehall Pharmacy, LLC*, 672 B.R. 768 (Bankr. E.D. Ark. 2025)**

Issue: Whether sanctions are appropriate against debtor's counsel for misleading statements and phantom case citations due to use of artificial intelligence in drafting motion seeking authority to pay critical vendors.

Holding: Sanctions were not warranted for Chapter 11 debtor's counsel's violation of Rule 9011, local rules, and Arkansas Rules of Professional Conduct by supporting incorrect generalization that it was routine in district to file and grant critical vendor motions with specific but non-existent case generated by artificial intelligence (AI) in drafting motion, as there was no indication that counsel purposely misled the court, counsel acknowledged their negligence, outlined safeguards implemented, and self-reported to state office of professional conduct. In this case the facts demonstrate a lack of intent to actively mislead court.

ii. ***In re Richburg*, 671 B.R. 918 (Bankr. D.S.C. 2025)**

Issue: Whether Rule 9011 sanctions should be imposed on debtor's counsel for citing fake case law generated by artificial intelligence.

Holding: No lawyer should use any generative artificial intelligence (AI) product to perform research without verifying the results. Under Rule 11, attorney's conduct is evaluated based on standard of objective reasonableness, meaning that violation only occurs if reasonable attorney in like circumstances could not have believed actions to be legally justified. In this case, nonmonetary sanctions were appropriate for Chapter 13 debtors' counsel's violation of Rule 9011 by citing fake case law generated by artificial intelligence (AI) in motion filed in adversary proceeding, in order to deter repetition of the conduct or deter comparable conduct by others similarly situated, and to serve as a guide of what not to do when using AI in pleadings filed with the Bankruptcy Court. Counsel was directed to complete at total of three hours of continuing legal education on ethics including at least two hours related to the ethical use of artificial intelligence in legal practice.

iii. ***In re Allegiance Coal USA Ltd*., 670 B.R. 1 (D. Del. 2025)**

Issue: Whether DIP lender objection to debtor's professional fees should be allowed.

Holding: Under "carve out" provision of debtor-in-possession (DIP) order, retained professionals' fees and expenses, so long as they met certain conditions, were senior to any obligations owed to lender that provided DIP financing. Despite argument that other provisions in DIP order prohibited debtors from using any assets to pay professional fees, DIP order did provide that the repayment of the DIP loan was subordinated to the repayment of the amounts set forth in the approved budget,

including the amounts in the professional fee accrual schedule, and DIP order's timing provisions could not override the priority scheme set forth in the order and Bankruptcy Code. Also, DIP order's "carve out" provision meant that retained professionals' fees and expenses, so long as they met certain conditions, were senior to any obligations owed to lender that provided DIP financing, and thus it was proper for final dismissal order to provide that distribution of the debtors' remaining cash should be paid, up to the amount of the "carve out," to the debtors' professionals. Further, contention that many of the retained professionals' time entries were overly vague or exhibited improper "lumping" did not demonstrate that Bankruptcy Court abused its discretion when awarding professional fees pursuant to a "carve out" provision of the debtor-in-possession (DIP) order. Bankruptcy Court's opinion as a whole thoroughly outlined the challenges and complexity of the contentious Chapter 11 cases, which involved attempting to sell assets of a distressed nature in the volatile coal industry, and with respect to certain time entries such as a single entry claiming 100 hours over an 11-month period for conference calls and other calls, those entries were not inconsistent with bankruptcy court's conclusion that the total hours were reasonable.

iv. In re Schlomer, 672 B.R. 9125 (Bankr. W.D. Tex. 2025)

Issue: Whether debtor's retention of special counsel for non-dischargeabilty defense could be paid from estate assets

Holding: Debtors-in-possession may retain counsel for non-estate matters without court approval and may pay them from non-estate funds, subject to the Bankruptcy Code's disclosure and reasonableness requirements and to the debtor-in-possession's ongoing obligation to never act contrary to its fiduciary duties to the estate as a whole, including in its actions such as retention, supervision, and compensation, with respect to its own litigation and counsel retained on its, and not the estate's, behalf. When discharging its duties as trustee, the debtor-in-possession may only retain counsel pursuant to the Bankruptcy Code's requirements, in order to represent the estate; but so long as the debtor-in-possession's interests do not conflict with the estate's, it can take actions to benefit itself, including by hiring lawyers to represent its interests

v. *In re MMA Law Firm*, 661 B.R. 548 (Bankr. S.D. Tex. 2024)

Issue: Whether law firm that handled mass-tort claims could be compensated under a hybrid fee agreement.

Holding: Alleged failure of Chapter 11 debtor to disclose in its application to employ counsel the amount that was owed to counsel did not preclude approving the application. Law firm, which was a law firm that handled mass-tort claims, for employment of counsel, flat fee of $60,000 to prosecute Chapter 11 debtor's bankruptcy case was reasonable under the circumstances and a 40% contingency fee was not unconscionable despite the argument that the terms of employment authorized a contingency fee on work performed in the mass tort cases in which counsel did not participate. The terms actually authorized a contingency fee on any value that counsel could bring into the estate. Despite contingency-fee arrangement, counsel was "disinterested," as required for approval of application by Chapter 11 debtor, which was a law firm that handled mass-tort claims, for employment of counsel. Counsel would only be entitled to a contingency fee if it brought value to the estate, and as such, counsel's interests were directly aligned with the interests of the estate.

Application by Chapter 11 debtor for employment of counsel would be approved because such terms reflected normal business terms in the marketplace, debtor and counsel were sophisticated business entities with equal bargaining power who engaged in an arms-length negotiation, proposed retention of counsel was in best interests of the estate, and debtor's counsel stipulated on the record that a contingency fee was not sought on a reduction in liability or any funds received that were subject to a valid security interest.

vi. ***In re Allegiance Coal USA Limited*, 661 B.R. 874 (Bankr. D. Del. 2024)**

Issue: Whether fees of professionals could be paid from DIP "carve out" in dismissed Chapter 11 case.

Holding: Chapter 11 debtors' prepetition secured lender did not forfeit its challenge to the allowance of estate professionals' fees, namely, that such allowance was prohibited by terms of Bankruptcy Court's debtor-in-possession (DIP) order, by failing to raise it in opposition to Court's initial dismissal order, which Court issued in response to debtors' dismissal motion proposing two-part process whereby Court first would determine that dismissal was appropriate, with remaining cash to be distributed in accordance with applicable statutory waterfall, and then would address allowance of professionals' fees under the Bankruptcy Code. Although the question was a close one, lender sufficiently preserved issue in brief originally filed in opposition to debtors' dismissal motion, which argued that amounts previously paid to professionals should be clawed back because debtors were only authorized to make payments to the extent they were included in an approved budget. Even if Bankruptcy Court were to consider extrinsic evidence in construing order approving debtor-in-possession (DIP) financing, Court would conclude that, consistent with language of DIP order, the parties' agreement was that fees of estate professionals would be paid at end of cases, to the extent Chapter 11 debtors then had sufficient cash, up to amounts protected by DIP order's carve-out for such fees. Evidence showed that professionals' decision to continue work in the face of prepetition secured lender's refusal to agree on a budget was premised on the parties' understanding that, although lender had the right to prevent cash payments from being made in any given period by refusing to agree on an approved budget, professionals were entitled to rely on the DIP order's carve-out to ensure that they were paid, ahead of lender, from any funds that debtors had on hand at end of cases. Amounts sought by estate professionals in the administratively insolvent, jointly administered cases of Chapter 11 debtor-coal mine operators were for fees and expenses that were "reasonable compensation for actual, necessary services" within meaning of the Bankruptcy Code, and so would be allowed, even though some time entries in professionals' billing records were "lumped". Records submitted contained enough detail to permit the Bankruptcy Court to form a judgment with respect to the reasonableness of the tasks performed and the fees being charged, and based on its review, the Court was able to find that the work performed by each of the professionals was reasonable in light of the circumstances presented, and that the fees sought were in the range of what one would expect in a case of comparable size and complexity.

vii. ***In re Golesis*, 659 B.R. 767 (Bankr. D. Utah 2024)**

Issue: Whether Chapter 11 debtor's counsel could be employed retroactive.

Holding: Assertion by debtor's counsel that it was simply too busy to file application with other bankruptcy papers on petition date will, without more, typically be inadequate to constitute "extraordinary circumstances" warranting allowing retroactive application to employ professionals. This is because debtor's counsel has at least some advance notice of the need for a bankruptcy filing, it should have completed a conflicts check before accepting the representation, and preparation of the employment application should, in most instances, require minimal time. In this case, Chapter 11 debtors' counsel failed to demonstrate extraordinary circumstances warranting retroactive employment of counsel for the following reasons: (i) filing applications to employ rested solely with counsel, (ii) counsel had been retained weeks prior to petition dates but did not have its applications to employ ready to file on petition dates, (iii) while counsel asserted that it operated under extreme time pressure to begin service and prepared two sets of bankruptcy papers so debtors' cases could be filed one day after the other, those tasks were common to and necessitated by essentially every Chapter 11 case, (iv) nothing in the particulars of the cases suggested that they were more complicated or required more or different work than other similar bankruptcy filings, and (v) even if the cases later presented complex issues, they plainly did not prevent counsel from timely filing the applications to employ.

F. U.S. TRUSTEE

i. ***United States Trustee v. John Q. Hammons Fall*, 144 S. Ct. 1588 (2024)**

Issue: Whether the proper remedy for the unconstitutional non-uniform increase in the US Trustee fees is to refund the excess paid by the debtor.

Holding: The Supreme Court reversed and remanded the decision of the Tenth Circuit that a refund of the debtor's quarterly fees was the appropriate remedy for a violation of the U.S. Constitution's Bankruptcy Clause uniformity requirement when Congress increased the fees required to be paid by Chapter 11 debtors. In 2022 the Supreme Court held in *Seigel v. Fitzgerald*, 596 U.S. 464 (2022) that the fee increase violated the uniformity requirements of the Constitution because it permitted different fees for Chapter 11 debtors depending on the district where their case was filed. The increased fees were implemented by the statute in U.S. Trustee districts, but the Federal Judicial Conference did not immediately increase these fees in Bankruptcy Administrator districts. The increase in fees began in January 2018 in large Chapter 11 cases. It was not until October 2018, that the Judicial Conference increased fees for newly filed cases in bankruptcy administrative districts. Ultimately, Congress mandated equal fees in all the cases in 2021.

The Supreme Court considered three options in determining the appropriate remedy for this constitutional violation. (1) refund the fees of the thousands of debtors who paid higher fees in districts administered by the U.S. Trustee program, (2) retroactively extract higher fees from the debtor's charged lower fees in districts administered by the Bankruptcy Administrator program, or (3) only require that the fees be equal in the future, thus providing a prospective fee parity. It was the latter option that the Supreme Court adopted. In determining which remedy to choose, the court considered the nature of the violation and considered three relevant factors. First, "the violation identified was non-uniformity, not high fees". Second, the fee disparity was short lived, lasting only from 2018 to 2021. Third, the disparity was small: 98% of the relevant class of debtors still paid uniform fees. The Court also considered the disruption that would follow from the imposition

of a refund that would significantly undermine the congressional goal of funding the U.S. Trustee program through the higher Chapter 11 fees. Refunding all large Chapter 11 debtors in the U.S. Trustee districts were estimated to cost approximately $326 million dollars. Additionally, the Government estimated that 85% of the large Chapter 11 cases subject to the higher fees between January 2018 through April 2021 have closed and some have been liquidated or otherwise cease to exist. Additionally, there is a serious practical challenge to impose higher fees in the Bankruptcy Administrator districts since the government estimated only ten of the roughly fifty cases involving debtors who paid lower fees are still open. Finally, the Court concluded that "the best evidence that Congress would not want such a remedy is that Congress itself chose not to pursue that course when amending the fee statute in 2021." Instead, Congress made the fees uniform in both U.S. Trustee districts and the Bankruptcy Administrative districts. The Court relied on Levin v. Commerce *Energy Inc.,* 560 U.S. 413, 427 (the Court must "implement what the legislature would have willed.").

Justice Gorsuch's dissent, in which Justices Thomas and Barrett joined, argued that the appropriate remedy was to compel restitution or compensation. In this case, Hammons had paid to the U.S. Trustee more than $2.5 million in "over-payments".

G. SECURED CLAIMS

i. ***In re Burnstead*, 782 F. Supp. 3d 1016 (W.D. Wash. 2025)**

Issue: Whether secured creditor had a lien in the proceeds of its prepetition collateral.

Holding: Under Article 9 of the Uniform Commercial Code (UCC), as adopted in Washington, secured creditor seeking to exercise its alleged rights in collateral and identifiable proceeds that are commingled with other property must provide documentation of its identifiable or traced proceeds using an approved tracing methodology; self-serving testimony of creditor is inadequate. In this case, the secured creditor failed to adequately trace postpetition client advisory fees that investment firm owed to Chapter 11 debtor's spouse, a securities broker formerly employed by creditor, to its original collateral pursuant to Article 9 of the Uniform Commercial Code (UCC), as adopted in Washington, as required to apply Code § 552's exception extending prepetition security interest to postpetition proceeds,

ii. ***In re K&L Trailer Leasing, Inc.*, 672 B.R. 24 (Bankr. E.D. Tenn. 2025)**

Issue: Whether perfected security interest in inventory of dealer of vehicles extended to inventory of affiliated leasing company after the inventory had been sold to that affiliate.

Holding: Under the Uniform Commercial Code (UCC), as adopted in Tennessee, transfers of five trailers from related dealer to Chapter 11 debtor were not sales to debtor as a "buyer in the ordinary course of business," and therefore, secured creditor's properly perfected inventory lien continued in the trailers and the creditor had priority on the trailers. The debtor was charged with knowledge that the transfer was in violation of the creditor's inventory security interest which required the creditor's express written consent for sales to dispose of any of the creditor's collateral other than by a sale of inventory in the ordinary course of business, given the open and notorious relationship

between the debtor and related entity, including their shared location of operations and common owners.

iii. ***In re Mayville Holdings, LLC*, 662 B.R. 354 (Bankr. E.D. Wis. 2024)**

Issue: The allowed amount of secured claim on debtor's assisted living facility.

Holding: When determining valuation of Chapter 11 debtor's assisted living facility, as was relevant to debtor's objection to creditor's claim that allegedly was secured by a mortgage and security interest in debtor's real and personal property, the Bankruptcy Court would place the initial burden on the party challenging the secured claim, i.e., the debtor, to present evidence sufficient to overcome the presumed validity and amount of the creditor's secured claim, which, once met, would shift the ultimate burden of persuasion to the creditor to demonstrate by a preponderance of the evidence both the extent of its lien and the value of the collateral securing its claim. In this case, the Bankruptcy Court gave the most weight to the "income capitalization" approach. The debtor intended to continue operating the property as an assisted living facility, and experts for both debtor and creditor agreed that the "highest and best" use of the property was to continue doing so. The Court determined that the Chapter 11 debtor's assisted living facility would be valued at $4,315,000, which was a value that was somewhere in between the valuation calculations done by experts for debtor and creditor, instead of assigning a dollar value to each critique. The Court's determination was a fact-finder's way to account for undue optimism in one report and undue pessimism in the other, without credentialing the Court as a third appraiser.

iv. ***In re Partners in Hope, Inc.*, 660 B.R. 366 (Bankr. D.S.C. 2024)**

Issue: Whether secured creditor should be granted relief from stay and whether Chapter 11 debtor could use rent collected as cash collateral.

Holding: Creditor demonstrated there was no equity in the property securing Chapter 11 debtor's obligations under loan agreement, as required for relief from the automatic stay to resume foreclosure; creditor's appraisal of the property showed "as-is market value" of $1,540,000, but the total amount owed under loans was $7,225,245.70. Also, Chapter 11 debtor failed to meet its burden to prove that property was necessary to an effective reorganization, warranting relief from automatic stay for creditor to resume foreclosure based on debtor's lack of equity in property. The debtor had made no payments to creditor for over one year, assisted living facility was not currently operating at the property and there was no date certain, or even a tentative date, as to when it would reopen. Rents received by entity that leased property from Chapter 11 debtor, and that was an insider, constituted cash collateral under terms of loan agreement with secured creditor. Given the early stages of debtor's Chapter 11 case at close to nine weeks and nature of business operating assisted living facility with 45 residents who relied on services provided, Bankruptcy Court would not prohibit debtor's use of creditor's cash collateral, but instead, would condition its use.

v. ***In re Mehl*, 660 B.R. 353 (Bankr. S.D.N.Y. 2024)**

Issue: Whether claim established by foreclosure action in state court can be determined by the Bankruptcy Court.

Holding: *Rooker-Feldman* doctrine barred Bankruptcy Court from determining Chapter 11 debtor's objection to proof of claim for $1,868,871.46 as to judgment of foreclosure and sale. Secured creditor had already obtained foreclosure judgment from the state court before the matter came before the Bankruptcy Court, and debtor raised the same defenses as grounds for objection which were considered and rejected by the state court. Also, under New York law, collateral estoppel barred Chapter 11 debtor's objection to proof of claim for $1,868,871.46 as to judgment of foreclosure and sale, asserting that secured creditor lacked standing to enforce promissory note and mortgage. State court had issued judgment of foreclosure and sale after lengthy litigation process wherein debtor raised numerous challenges to the status of secured creditor, which were rejected by the state court, and debtor a full and fair opportunity to contest that prior determination.

vi. ***In re Damon Capital, Ltd*, 2024 WL 46027 (Bankr. W.D. Tex. Jan. 3, 2024)**

Issue: Whether oversecured creditor should be allowed attorney fees.

Holding: There are four basic requirements for allowance of fees, costs, or charges to a secured creditor: (1) the claim must be an allowed secured claim; (2) the creditor holding the claim must be over-secured; (3) the entitlement to fees, costs, or charges must be provided for under some agreement or state statute; and (4) the fees, costs, or charges sought must be reasonable. A bankruptcy court reviewing the reasonableness of secured creditor's fees should consider the circumstances surrounding the case, the manner of its administration, whether duplication of services occurred, and twelve factors: (1) time and labor required, (2) novelty and difficulty of the questions, (3) skill requisite to perform the legal service properly, (4) preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) undesirability of the case, (10) experience, reputation and ability of attorneys, (11) nature and length of the professional relationship with the client, and (12) awards in similar cases. In this case, the fact that it was a two-party bankruptcy case, and that Chapter 11 debtor's own posture and activities contributed significantly to oversecured creditor-lender's fees, supported a determination that creditor's requested attorney fees in the amount of $62,257.50 and $4,754.90 in expenses, were reasonable for the following reasons: the only two parties that mattered in the case were debtor and creditor, creditor was not just one creditor among many, the case was a single asset real estate case, creditor had to stay active or risk losing its rights, debtor's actions prompted a considerable portion of the fees incurred by creditor, debtor's conduct in the case was somewhat haphazard, and creditor's vigilance was both reasonable and necessary. 11 U.S.C.A. § 506(b).

H. PRIORITY CLAIMS

i. ***In re Steepologie, LLC*, 2024 WL 117525 (Bankr. W.D. Tex. Jan. 10, 2024)**

Issue: Whether debtor had to immediately pay real property lease claim allowed as administrative expense.

Holding: Under the Bankruptcy Code, the usual remedy for the failure of a trustee or debtor-in-possession acting as trustee to make a payment pursuant to Code § 365(d)(3) requiring trustees or

debtors-in-possession to timely perform lease obligations arising from and after the petition date is an automatic right to payment of that amount in full as an administrative claim. Such failure to pay does not lead to a free-floating, superpriority claim entitling a lessor to immediate payment in full, nor does it require a lessor to assert a traditional administrative expense claim by showing that the lease obligations were reasonable and necessary costs of preserving the estate. If a debtor is lingering for months without paying, contrary to its obligations under Code § 365(d)(3), courts can provide various remedies, including lifting the automatic stay to permit landlords to seek eviction or shortening the time frame in which debtors may decide whether to assume or reject the contract. In this case, the Bankruptcy Court declined to exercise its discretion to grant landlord's motion to compel immediate payment of $6,980 for unpaid postpetition, pre-rejection rent and charges due under its lease with debtor, a national tea retailer which, within a month after filing its Chapter 11, Subchapter V petition, vacated the store it had leased in a shopping mall and moved successfully to reject the unexpired lease, but, rather, appropriate remedy for debtor's failure to make payment was an administrative claim. There was just one month of overdue rent, debtor had moved promptly to reject its lease before landlord even sought relief from Court, the situation thus lacked the hallmarks of gamesmanship or abuse that would have merited immediate action by Court, and thus the court found that the issue was not ripe where there was no evidence of administrative insolvency, and where debtor, which shortly after filing its Chapter 11, Subchapter V petition had vacated the store it had leased in a shopping mall and moved successfully to reject the unexpired lease, and at the time of landlord's motion to compel immediate payment, had not filed a plan.

ii. ***In re GOL Linhas Aereas Inteligentes S.A.*, 661 B.R. 330 (Bankr. S.D.N.Y. 2024)**

Issue: Whether prepetition employee incentive plans could be paid as priority claims.

Holding: Rule, that for court to approve debtor's use of estate property other than in the ordinary course of business, debtor must show that its decision was based on its sound business judgment, applies with full force to questions of employee compensation. Once a corporate debtor articulates a valid business justification for using estate property outside the ordinary course of business, strong presumption arises that, in making a business decision, debtor's directors acted on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the company. Two tests are used in determining whether a transaction is "ordinary," for purposes of the section of the Bankruptcy Code governing use, sale, or lease of estate property: (1) "creditor's expectation test," also known as "vertical test," which examines transaction from perspective of a hypothetical creditor and inquires whether it poses economic risks of a nature different from those creditor accepted when it decided to enter into a contract with debtor, and (2) "industry-wide test," also called "horizontal test," which examines transaction with an industry-wide perspective and inquires whether it is of a type that other similar businesses would engage in as ordinary business. When determining whether proposed compensation plan and process for its development meet the "sound business judgment" test for the purpose of approving such plan under Code § 503(c)(3) setting forth restrictions on allowance of certain out-of-the-ordinary-course transfers to officers, managers, or consultants as administrative expenses, courts in the Second Circuit generally consider the *Dana* factors, 358 B.R. 567, that is, whether: (1) plan is calculated to achieve the desired performance, (2) cost of plan is reasonable in the context of debtor's assets, liabilities, and earning potential, (3) scope of plan is fair and reasonable or discriminates unfairly among employees, (4) plan is

consistent with industry standards, (5) debtor performed due diligence in investigating need for plan, and (6) debtor received independent advice in performing due diligence regarding, creating, and authorizing plan.

Incentive payments to employees made by Chapter 11 debtors, a Brazilian airline and its subsidiaries, were authorized as "in the ordinary course of business". Payments satisfied "vertical" test, as debtors had maintained their incentive plans as long as they had been in operation, making modifications over time to reflect business needs and market practices, so any creditor that chose to contract with debtors was aware that they regularly made incentive payments and would reasonably expect them to continue doing so. Also the payments satisfied "horizontal" test, as Brazilian law required debtors to make payments under their incentive plans, Brazil's constitution established labor unions for various sectors and territories to represent both employees and employers, unions negotiated and entered into collective bargaining agreements (CBA) which governed compensation, including incentive plans, and terms of debtors' CBAs were similar to those of comparable businesses. Also payments were consistent with industry standards, and had been maintained continuously for more than 20 years, and payments did not violate Code §503(c) setting forth restrictions on allowance of retention payments or out-of-the-ordinary-course transfers to officers, managers, or consultants as administrative expenses, as they were not retention or severance payments, they were made to employees, not insiders, and even if they were not "ordinary course" payments, they were justified by circumstances of case, since they were contingent on achievement of goals set on various incentive metrics, their annual cost was fair and reasonable, their scope and design were reasonable, and they were implemented after due diligence by debtors.

I. UNSECURED CLAIMS

i. ***In re Yellow Corporation*, 672 B.R. 219 (Bankr. D. Del. 2025)**

Issue: Whether confirmation of Chapter 11 plan accelerated withdrawal liability obligations under ERISA

Holding: Bankruptcy filing of Chapter 11 debtors, a trucking company and its affiliates which had withdrawn from their multiemployer pension plans prepetition, operated to accelerate their withdrawal liability obligations under ERISA, which would otherwise have been payable over 20 years, into a lump-sum amount. Code § 502 governing allowance of claims or interests, in providing that when a proof of claim has been objected to, the court shall determine the amount of such claim as of the petition date and shall allow such claim in such amount, operates to accelerate all of debtors' liability to the petition date.

ii. ***In re Yellow Corporation*, 670 B.R. 397 (Bankr. D. Del. 2025)**

Issue: Whether joinder to debtor's objection to proof of claim was mooted by debtor's decision to withdraw objection.

Holding: Fact that entity that held equity in Chapter 11 debtors filed "joinder" in debtors' objection to proofs of claim filed by multiemployer pension plans, rather than "standalone" objection, did not mean that equity holder's objection was effectively mooted by debtors' subsequent decision to

withdraw their objection in anticipation of filing a joint plan of reorganization that would settle various objections. Instead, the Bankruptcy Court would treat equity holder's joinder as it was intended, namely, as means of asserting the same objections to pension plan proofs of claim as those asserted by debtors, that is, as incorporating by reference debtors' objections. When Code § 502(b) says that any "party in interest" has a right to appear and be heard, such as an objection to the allowance of a claim, it means just what it says, that is, that any party in interest has a right to appear and be heard.

iii. ***In re Mallinckrodt PLC*, 99 F.4th 617 (3rd Cir. 2024)**

Issue: Whether royalty obligation by Debtor was an unsecured claim.

Holding: The Third Circuit affirmed the Bankruptcy Court's decision approving Mallinckrodt's discharge of future royalty payments to Sanofi, leaving Sanofi with only an unsecured claim. Years before Mallinckrodt filed for bankruptcy, Sanofi sold Mallinckrodt its rights to a drug in exchange for $100,000 plus an annual royalty that was payable as long as Mallinckrodt sold $10 million worth of the drug. When Mallinckrodt filed for bankruptcy, it sought to discharge all future royalty payments. The Bankruptcy Court approved the discharge and the District Court affirmed. The Third Circuit likewise affirmed, concluding that the future royalties satisfied the Bankruptcy Code's broad definition of "claim." Reasoning that the Bankruptcy Code allows claims that are both contingent and unliquidated, the Court rejected Sanofi's argument that the royalties were too indefinite to be a claim. It also rejected Sanofi's argument that the claim was not dischargeable because it would not exist unless and until Mallinckrodt hit its sales trigger each year. The Court held that a claim can "arise" before it is "triggered," and that Sanofi's claim arose once the parties' signed the contract agreeing to a contingent right to payment. Thus, the Court agreed that the claim for royalties was dischargeable in bankruptcy.

iv. ***In re Licup*, 95 F. 4th 1234 (9th Cir. 2024)**

Issue: Whether debtor's failure to properly schedule debt makes the debt nondischargeable.

Holding: The Ninth Circuit concluded "that, outside of a non-asset bankruptcy, a debtor's failure to properly schedule a debt renders that debt nondischargeable in its entirety." Under Code § 523(a)(3), when an individual is the debtor, makes debts nondischargeable if they are not properly scheduled unless the creditor had notice or actual knowledge of the bankruptcy case. This rule is grounded in fundamental principles of due process, and the court concluded that considerations relevant to no-asset cases were not relevant where the debtor has assets to distribute, and creditors were required to file proofs of claim. Therefore, the entire debt of the creditor who did not receive proper notice of the bankruptcy case was nondischargeable.

J. AVOIDANCE

i. ***In re Firstbase.IO, Inc.*, 670 B.R. 694 (Bankr. S.D.N.Y. 2025)**

Issue: Whether creditor's judgment lien can be avoided.

Holding: Judgment creditor's lien on personal property of Chapter 11 debtor-in-possession, which arose pursuant to New York law when creditor delivered execution to sheriff, was a judicial lien, and not a statutory lien, within meaning of Code § 547(c)(6). If there had not been judicial action taken by the court issuing a monetary judgment in creditor's favor, then there would not and could not be a lien under New York law. Also, judgment creditor would receive less in hypothetical Chapter 7 case for debtor-in-possession than it would receive as a secured creditor in debtor's Chapter 11 case as a result of lien on debtor's personal property, for the purposes of Code § 547(b)(5). Debtor had other secured creditors and some priority creditors listed on schedules which would have to be paid before unsecured creditors in a Chapter 7 case, and there would be administrative expenses incurred in the hypothetical Chapter 7 case such as payment of the trustee's fees and the fees of any professionals retained by the trustee.

ii. ***In re Black Elk Energy Offshore Operations, LLC*, 114 F.4th 343 (5th Cir. 2024)**

Issue: Whether knowledge of illicit scheme to defraud creditors was imputed to investors, thus making transfers to investors were avoidable.

Holding: Under Code § 550(b)(1) setting forth "good faith" defense to trustee's recovery of avoidable transfers, pursuant to which trustee may not recover from a transferee who takes for value in good faith, and without knowledge of voidability of the transfer avoided, transferee's good faith may be defeated by knowledge imputed from transferee's agent. Under law of fraudulent conveyances incorporated by the Code, principals are traditionally liable for the frauds of their agents, that traditional linkage between principal and agent is not severed by the Code's mere use of term "knowledge," there is no reason to think that Congress enacted that Code section in derogation of common law principle that knowledge of agent is imputed to principal, and even if provision embodies an "inquiry notice" standard under which transferees must have actual awareness of suspicious facts, knowledge imputed to principal from agent is generally considered actual knowledge. Additionally, Bankruptcy Court did not abuse its discretion in using "proceeds-in, first-out" rule in tracing tainted funds, that is, in assuming that tainted funds were transferred before untainted ones, in litigation trustee's adversary proceeding against investors in investment fund of hedge fund whose principal also was Chapter 11 debtor's controlling shareholder, in which trustee sought to avoid and recover principal's fraudulent transfers of debtor's property. Bankruptcy Court's approach "reflected reality," namely, that principal orchestrated scheme to defraud debtor's creditors in order to pay investors for their investment in the fund, principal paid investors shortly after receiving proceeds from sale of debtor's assets, and deeming principal's transfer to investors untraceable to his fraud would have elevated "substanceless formalities" over reality.

K. EXECUTORY CONTRACTS

i. ***In re Welcome Group 2, LLC*, 660 B.R. 874 (Bankr. S.D. Ohio 2024)**

Issue: Whether debtor could assume franchise agreement or whether relief from stay should be granted to permit franchisor to terminate franchise agreement authorizing Chapter 11 debtor to operate hotel.

Holding: Bankruptcy Court would apply "actual test," and not "hypothetical test," for purposes of statutory limitation on trustee's ability to "assume or assign" debtor's executory contracts, without consent of other party thereto, if applicable law would excuse other party from accepting performance from, or rendering performance to, an entity other than debtor or debtor-in-possession, such that debtor was not prohibited from assuming executory contract if it did not intend on assigning it. The application of the "actual test" was consistent with the plain meaning of Code § 365(c)(1) and promoted the objectives of Chapter 11 relief and the Bankruptcy Code when a debtor intended to assume an executory contract but not assign it. Terms in an executory contract that prohibit the assignment of the executory contact are unenforceable and Chapter 11 debtor is not prohibited from assuming executory contract if it does not intend on assigning it.

L. APPOINTMENT OF TRUSTEE

i. ***In re BMO Litigation Trust*, 115 F.4th 901 (8th Cir. 2024)**

Issue: Whether trustee in Chapter 11 case could assert claims against third parties for participating in Ponzi scheme**.**

Holding: Defense of in pari delicto is available in action by bankruptcy trustee against another party if defense could have been raised against debtor because the trustee stands in shoes of debtor. Under Minnesota's in pari delicto doctrine, trustee in Chapter 11 case of debtor-company that was created solely to operate Ponzi scheme, who had been appointed as receiver for debtor prior to filing bankruptcy on behalf of the entity, stood in the shoes of debtor and could not assert claims against third parties for participating in Ponzi scheme that debtor orchestrated. When receiver transferred the claims to the bankruptcy estate, the custodian of the claims changed, but the claims did not, and the claims entered the bankruptcy estate subject to a defense based on debtor's previous fraudulent acts.

ii. ***In re FTX Trading Ltd*, 91 F.4th 148 (3rd Cir. 2024)**

Issue: Whether appointment of examiner in Chapter 11 case of cryptocurrency company with unsecured debts that exceeded $5 million was mandatory**.**

Holding: The Third Circuit reversed the Bankruptcy Court's decision after determining that the plain language of Code § 1104(c) requires the appointment of an examiner in cases where "the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000." Section 1104(c) states that "the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate..." if the debtor's unsecured debts exceed the $5,000,000 threshold described in Code § 1104(c)(2), and the Third Circuit rejected the Bankruptcy Court's interpretation of § 1104(c) that the "as is appropriate" language may be read to give the Bankruptcy Court discretion in deciding to appoint an examiner even if the condition of Code § 1104(c)(2) is satisfied. The Third Circuit explained that this interpretation contradicts rules of statutory construction as well as clear congressional intent to provide "special protection for the large cases having great public interest." Congress made plain its intention to mandate appointment of examiner by using the word "shall," stating that courts "shall order the appointment of an examiner to conduct such an investigation of the debtor as is

appropriate," and pursuant to last-antecedent rule of statutory construction, the phrase "as is appropriate" modified the words that immediately preceded it, which were "to conduct such an examination of the debtor," not "shall order the appointment of an examiner," referring to the nature of the investigation and not the appointment of the examiner. Additionally, the Third Circuit explained that its interpretation of the statute still maintains acts of discretion in the appointment of an examiner because (i) examiners are not automatically appointed in large cases and must be requested by the U.S. Trustee or a party in interest, and (ii) the "as is appropriate" language in the statute gives the bankruptcy court broad discretion in directing an examiner's investigation to avoid duplication of efforts or disruption to the reorganization process. Examiner is not automatically appointed in Chapter 11 cases where $5 million of unsecured debt exists and the UST or party in interest do not file a motion to appoint an examiner.

iii. ***In re Eletson Holdings, Inc.* 659 B.R. 426 (Bankr. S.D.N.Y. 2024)**

Issue: Whether trustee should be appointed in Chapter 11 case.

Holding: Appointment of Chapter 11 trustee is extraordinary remedy, and party seeking appointment of trustee has burden of showing by clear and convincing evidence that appointment of trustee is warranted. Petitioning creditors failed to establish "cause" to appoint Chapter 11 trustee by clear and convincing evidence based on debtors' conduct in bankruptcy case. The debtors timely filed their schedules and generally complied with their mandatory reporting requirements under the Bankruptcy Code, though there had been a number of discovery disputes, the case began as a hotly-contested involuntary Chapter 7 case, which in part could explain debtors' initial hesitancy to exchange information, and debtors' choice to permit competing plans by allowing exclusivity to lapse had already yielded multiple amended plans that invariably would increase creditor recovery. Additionally, petitioning creditors failed to establish that appointment of Chapter 11 trustee was in best interests of creditors based on debtors' lack of trustworthiness. While creditors asserted that debtors' prepetition default under restructuring support agreement and failure to pay notes made debtors untrustworthy, many bankruptcies were precipitated by some degree of such financial distress, and debtors had largely complied with discovery requests in the case after receiving direction from the court and the court was unaware of any required bankruptcy disclosures that remained outstanding. Creditor group, no matter how dominant, cannot justify the appointment of a Chapter 11 trustee simply by alleging that it would be in its interests.

M. CONVERSION

i. ***In re C.M. Heavy Machinery, LLC*, 671 B.R. 309 (Bankr. E.D. Okla. 2025)**

Issue: Whether Chapter 11 case should be dismissed or converted.

Holding: Creditor established "cause" for dismissal or conversion of debtor's Chapter 11 case by a preponderance of the evidence due to gross mismanagement of the estate, based on debtor's inaccurate schedules, monthly operating reports, misconduct by debtor's sole owner and president regarding use of estate funds to pay personal expenses, debtor's failure to collect accounts receivable, filing inaccurate schedules and failing to correct schedules in a timely manner, failure to correct its financial records and reports, lack of proper oversight of financial activities, and

inability to provide basic information regarding postpetition income and expenses. Once "cause" to dismiss or convert Chapter 11 case is established, burden shifts to debtor to specifically identify unusual circumstances which demonstrate that dismissal or conversion is not in best interests of creditors and estate. Prospect that potentially meritorious litigation will bring funds into estate is insufficient basis to conclude that rehabilitation is possible, so as to preclude dismissal of Chapter 11 case on "continuing loss" theory. Conversion of debtor's Chapter 11 case to Chapter 7, rather than dismissal, was in the best interests of creditors and the estate, given that there could be assets available for liquidation and distribution by a Chapter 7 trustee, as debtor had equipment located at job sites and perhaps in other states or not listed on its schedules, there was pending litigation that could be managed by a Chapter 7 trustee, and an investigation into the ownership of certain property could be necessary.

ii. ***In re Giuliani*, 661 B.R. 493 (Bankr. S.D.N.Y. 2024)**

Issue: Whether debtor could convert case from Chapter 11 to Chapter 7

Holding: "Cause" existed to convert or dismiss Chapter 11 case, based on debtor's continued failure to meet reporting obligations and provide financial transparency required of a debtor-in-possession for the following reasons: (i) debtor failed to provide even basic disclosure about assets in response to Rule 2004 order authorizing unsecured creditors committee to seek discovery from him and his affiliated corporate entities, (ii) failed to fully meet his obligation to file certain schedules and lists detailing his financial condition, and (iii) failed to fulfill his obligations to file accurate, complete, and timely monthly operating reports, (iv) there were deficiencies in the information debtor did provide, (v) debtor only belatedly disclosed contract for upcoming book, (vi) debtor concealed fact that he was promoting a coffee brand, and (vii) debtor's lack of transparency was particularly troubling given concerns that he had engaged in self-dealing and had potential conflicts of interest that would hamper administration of case. Upon finding of "cause" to dismiss or convert Chapter 11 case of debtor, a former politician who had served as part of former President Trump's legal team and whose allegedly defamatory statements about election fraud resulted in $148 million judgment against him, dismissal of case with one-year bar to refiling, rather than appointment of trustee, was in the best interests of creditors and the estate because debtor's uncooperative conduct and lack of financial transparency was likely to continue after appointment of a trustee, there was legitimate concern that remaining in Chapter 11 would result in administrative expenses that would erode much, if not all, of the estate's value, including by exposing the estate to liability for debtor's continued defamatory conduct, the stay in Chapter 11 would be lengthy, given a trustee's need to pursue various complex investigations, and there was credible risk that debtor would cease any income-producing activity if a trustee were appointed. Also, conversion of the case to a Chapter 7 liquidation case was not in the best interests of creditors and the estate, where conversion was vigorously opposed by unsecured creditors committee and creditors who had obtained $148 million prepetition default judgment against debtor for purportedly defaming them by falsely alleging that they committed election fraud, both of whom correctly viewed conversion as a substantial step backwards because a newly appointed Chapter 7 trustee would need to learn the case from scratch without assistance of the committee, which would be disbanded in any Chapter 7 case, and such proceeding was ill equipped to maximize any value from debtor's ongoing business ventures.

iii. ***In re Pure Repair and Trucking LLC* 658 B.R. 895 (Bankr. S.D. Ohio 2024)**

Issue: Whether U.S. trustee's motion to convert or dismiss should be granted**.**

Holding: Bankruptcy Code establishes a two-step process for the court to follow in determining whether to dismiss or convert a Chapter 11 case: the court must first determine whether there is cause for conversion or dismissal, and if the court finds cause, it must then consider whether the "unusual circumstances" exception has been established by debtor. In this case, debtor's failure to obtain liability insurance established "cause" to convert or dismiss Chapter 11 case because debtor was a property owner and operated a truck repair business, with a structure on the property in poor condition, and thus needed liability insurance in order to protect the estate, creditors, and the public. Upon finding "cause" to convert or dismiss debtor's Chapter 11 case for failing to obtain appropriate liability insurance, conversion to Chapter 7 was in the best interests of creditors and the estate, given the undisputed surplus of assets over liabilities, so that a trustee could oversee the liquidation of debtor's assets, which was further supported by the fact that no party, other than debtor, supported dismissal, and debtor did not address the fact that dismissal, and resulting foreclosure sale, would not result in any payment to unsecured creditors.

iv. ***In re Corley Nissan, LLC*. 656 B.R. 856 (Bankr. D.N.M. 2024)**

Issue: Whether U.S. Trustee's motion to dismiss or convert should be granted.

Holding: Court held as follows: (1) "Cause" did not exist to convert or dismiss Chapter 11 case of debtor that leased property to automobile dealership based on failure to maintain property insurance, which did not pose a material risk to recoveries by secured creditors, because certain creditors maintained forced placed insurance insuring their interest in the property, another creditor's interest was adequately protected by its security cushion, even if disaster, such as a fire, were to strike the properties, and Internal Revenue Service's (IRS) claim in the amount of $500 was so de minimus in comparison to the value of the property that the court would disregard it.

(2) "Cause" did not exist to convert or dismiss Chapter 11 case of debtor that leased property from related entity and operated automobile dealership based on failure to maintain liability insurance, which did not pose a risk to creditors or the public. Debtor had no business operations and few assets other than some personal property.

In this case, debtors established unusual circumstances to prevent conversion or dismissal of their jointly administered Chapter 11 cases for "cause" due to their failure to maintain appropriate insurance, where there was a reasonable justification for debtors' failure to maintain property or liability insurance because (i) debtors were unable to afford the insurance, (ii) failure to maintain insurance on personal property would be cured through abandonment of such property, (iii) debtor had rental income that appeared sufficient to purchase liability insurance, (iv) there was a reasonable likelihood that a plan would be confirmed within a reasonable period of time, and (v) if cases were converted to Chapter 7, trustee would likely declare "no asset" estate, or if cases were dismissed, claims would be almost entirely unpaid.

v. ***In re Carrington*, 710 F. Supp. 3d 248 (S.D.N.Y. 2024)**

Issue: Whether Chapter 11 case should be converted to Chapter 7 based on gross mismanagement.

Holding: Bankruptcy Court did not abuse its discretion in issuing order converting Chapter 11 case to Chapter 7 where the Court had ample grounds for conversion, including debtor's violation of her financial-disclosure obligations, unauthorized sale of her Florida property, unauthorized retention of a real estate broker, and later failure to bring the sale to the Court's attention. Further the debtor had been in bankruptcy for more than three years without having had a plan of reorganization confirmed, after repeated extensions the Court fixed a date as the deadline for debtor to file a plan, but she failed to do so. Finally, debtor's self-described state of emotional, physical, and financial exhaustion further supported the Bankruptcy Court's finding that she was not up to fulfilling her duties under Chapter 11, and no party sought dismissal instead of conversion.

N. DISMISSAL

i. ***In re BMI Oldco, Inc.*, 671 B.R. 215 (Bankr. S.D. Tex. 2025)**

Issue: Whether Chapter 11 case with asbestos channeling injunction should be dismissed.

Holding: In determining whether to dismiss bankruptcy case for lack of good faith, court must conduct an on-the-spot evaluation of debtor's financial condition, motives, and the local financial realities. Chapter 11 debtor that mined, beneficiated, and sold talc did not file bankruptcy petition in bad faith, as might warrant dismissal for "cause," even though debtor's owner could benefit from personal injury trust for talc-related claims and protection of channeling injunction established under plan, in exchange for contribution from owner and other non-debtor affiliates. Debtor was not using the bankruptcy case solely to assist its owner, instead, debtor sought to settle claims against debtor through the trust, and there was prospect of material benefit to current and future talc claimants. Furthermore, dismissal of debtor's Chapter 11 case for "cause" based on "substantial or continuing loss to or diminution of the estate and absence of reasonably likelihood of rehabilitation" was not warranted, as debtor that mined, beneficiated, and sold talc needed time to properly prosecute its causes of action against affiliates alleging negligent testing of asbestos for the benefit of future talc-related personal injury claimants, and debtor's owner was committed to reserving $215 million to fund talc personal injury trust and related asbestos expenses.. Also, dismissing the case and allowing the current claimants to deplete debtor's assets in the tort system would not serve the best interests of future claimants. The hallmark of any asbestos bankruptcy case is to provide for future claimants due to the latency period of asbestos-related diseases.

ii. ***In re Al Zawawi*, 97 F.4th 1244 (11th Cir. 2024)**

Issue: Whether trustee in foreign proceeding was eligible for Chapter 15 case.

Holding: The Eleventh Circuit affirmed the Bankruptcy Court's holding that Code § 109(a) does not apply to Chapter 15 cases and does not establish a prerequisite for the recognition of a foreign proceeding under Code § 1517. Talal Qais Abdulmunem Al Zawawi ("Al Zawawi"), a citizen of Oman, owned shares in an entity that owned roughly $94 million worth of real estate in Florida. In

2017, while Al Zawawi and his family were residing in the United Kingdom, Al Zawawi's wife filed for divorce. A U.K. court granted her a divorce decree and a judgment against Al Zawawi for approximately 24 million pounds. In 2020, Al Zawawi's ex-wife petitioned the U.K. court to place him in involuntary bankruptcy, alleging that he had failed to make payments on the March 2019 judgment. Al Zawawi was adjudged bankrupt in June 2020. In March 2021, the joint trustees appointed to his U.K. bankruptcy filed a Chapter 15 Petition for Recognition of a Foreign Proceeding in the U.S. Bankruptcy Court for the Middle District of Florida.

Al Zawawi argued that the Chapter 15 petition should be denied and the case dismissed because it did not satisfy Code § 109(a), which states that a person cannot qualify as a "debtor" unless he or she "resides or has a domicile, a place of business, or property in the United States, or a municipality." The joint trustees argued that Code § 109(a) does not apply to Chapter 15 cases but even if it did, Al Zawawi qualified as a "debtor" based on his property interests in Florida. The Bankruptcy Court agreed with both arguments, and the District Court affirmed on the basis that Code § 109(a) does not apply to Chapter 15 cases.

The Eleventh Circuit first noted that "[a] plain reading of the Bankruptcy Code—specifically § 103(a)—indicates that § 109(a) *does* apply to Chapter 15 cases," because Code § 103(a) states that "this chapter . . . appl[ies] in a case under chapter 15." However, the court concluded that it was bound to its prior decision in *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988), which held that the debtor eligibility language in Chapter 11 did not apply to cases brought under the former § 304, the predecessor to Chapter 15. In *Goerg*, the Eleventh Circuit concluded that there was an "anomaly" in the Bankruptcy Code because the definition of "foreign proceeding" includes the term "debtor"—suggesting that the subject of the proceeding must qualify as a debtor under United States bankruptcy law—but also states that the "foreign proceeding" does not need to be a bankruptcy proceeding under either foreign or United States law. The *Goerg* court resolved the anomaly by looking to § 304's purpose, which was "to help further the efficiency of foreign insolvency proceedings involving worldwide assets." It held that this purpose would be best served by holding that "'debtor' eligibility under the [Bankruptcy] Code" was not "a prerequisite to section 304 ancillary assistance."

The Eleventh Circuit concluded that because the definition of "foreign proceedings" had not changed significantly since *Goerg* and "the former § 304 and Chapter 15 are sufficiently similar in terms of their purposes," the *Goerg* decision was controlling. Two judges filed concurring opinions. Judge Lagoa agreed that *Goerg* was binding precedent but explained that if the court "were writing on a clean slate," he would reverse the bankruptcy court's ruling. Judge Tjoflat agreed with the majority's ultimate conclusion but disagreed with its "interpretation of *Goerg* as abstract purposivism," arguing that the text of the Code supported the holdings in both *Goerg* and the instant case.

This decision creates a split in the Circuit Courts. In *In re Barnet*, 737 F.3d 238 (2nd Cir. 2013), the Second Circuit held that foreign entities seeking recognition under Chapter 15 must have a residence, domicile, place of business or assets in the United States pursuant to Code § 109(a). Courts in these jurisdictions have applied a broad definition of property of the estate, thus enabling debtors to meet the statutory requirement. *See In re Avanti Communications Group*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018)(debtor's only property within the United States were retainer funds held by a U.S. law firm).

iii. ***In re JJ Arch LLC*, 663 B.R. 258 (Bankr. S.D.N.Y. 2024)**

Issue: Whether Chapter 11 case should be dismissed**.**

Holding: Chapter 11 debtor limited liability company (LLC) failed to demonstrate a reasonable likelihood a plan would be confirmed acceptably soon, as required to apply exception to dismissal or conversion of case for "cause" based on unusual circumstances. The plan could never satisfy confirmation requirements without resolution of governance issues raised in state court proceeding. Also, when considering whether to retain jurisdiction of related proceedings after termination of the underlying bankruptcy case, the court is to consider four facts, namely, judicial economy, convenience to the parties, fairness, and comity. In this case, the factors do not support retention by the Bankruptcy Court. The post-dismissal retention of related proceedings is a power that should be used sparingly.

iv. ***In re Georgian Backyard LLC*, 661 B.R. 102 (Bankr. E.D.N.Y. 2024)**

Issue: Whether Chapter 11 case should be dismissed for cause.

Holding: If issue on motion to dismiss Chapter 11 case for cause is whether the petition was filed in good faith, movant bears initial burden to make prima facie showing to support allegation of bad faith, then burden shifts to debtor to demonstrate that petition was filed in good faith. Under New York law, member who owned 50% membership interest in debtor limited liability company had authority to commence Chapter 11 case for debtor. The member was authorized to manage and bind the debtor, none of the articles of organization, operating agreement, or applicable law limited member's authority to commence a bankruptcy case for debtor or require a majority or supermajority member vote to authorize a bankruptcy case for debtor, and even assuming that bankruptcy was tantamount to dissolution, New York Limited Liability Company Law (NYLLCL) did not require unanimous member consent for dissolution. Thus, member who owned 50% membership interest in debtor failed to demonstrate cause to dismiss Chapter 11 case based on conclusory and unsupported allegation that other 50% member caused voluntary petition for relief to be filed on behalf of debtor to protect other member from first member's claims in state court action. Further the member failed to demonstrate cause to dismiss Chapter 11 case based on debtor's failure to file monthly operating reports, after the debtor filed the missing operating reports.

O. USE AND SALES OF PROPERTY

i. ***In re Silver Airways, LLC*, 671 B.R. 533 (Bankr. S.D. Fla. 2025)**

Issue: Whether DIP financing and sale of property should be approved.

Holding: Chapter 11 debtor-airlines' proposed debtor-in-possession (DIP) financing and bidding procedures in connection with proposed sale of substantially all assets of one debtor would be approved, even though the record reflected a significant administrative expense burden, where the affected parties, i.e. the administrative claimants, gave their consent, which was informed, qualified, and on the record, and if not approved, DIP lender would not advance additional funds, and debtors

would be grounded, with the result being an immediate collapse of any effort to sell the enterprises as going concerns.

ii. ***In re Oklahoma Forge, LLC*, 671 B.R. 297 (Bankr. N.D. Okla. 2025)**

Issue: Whether sale of assets free and clear of liens should be approved.

Holding: Courts apply "business judgment" test to determine whether proposed sale of assets outside of the ordinary course of business should be approved, whereby trustee or debtor in possession seeking approval to sell has the burden to show sound business reasons for the terms of the proposed sale. Factors for a court to consider under "business judgment" test when deciding whether to approve sale of debtor's assets outside of the ordinary course of business include: (1) any improper or bad motive, (2) whether the price is fair and the negotiations or bidding occurred at arm's length, and (3) whether the trustee followed adequate procedures, including proper exposure to the market and accurate and reasonable notice to all parties in interest. In this case, Chapter 11 debtor exercised sound business judgment as to propriety of sale of its assets outside ordinary course of business and as to preparation and conduct of auction process, where debtor had ceased operations and had no ability or plan to reorganize as a going concern, bidders were aware of the full range of criteria debtor would use to evaluate the highest and best bid, and those criteria were designed to create a uniform risk profile between the bids that would leave debtor in the same position regardless of which bidder ultimately prevailed. Also, Chapter 11 debtor exercised sound business judgment in selection of highest and best bid for sale of substantially all its assets, even though competing bid appeared to bring $137,500 more to the estate, making it the highest monetary bid, and regardless of whether insiders may have also benefited from the sale, where debtor had made it clear that it planned to condition the sale of its assets on the simultaneous resolution of its conflicts with its landlord, and winning bidder chose to meet that condition by purchasing landlord's real property in conjunction with its purchase of debtor's assets, whereas competing bidder only offered to provide financial resources to fund debtor's litigation against landlord and was unwilling to accept all of the risk involved in such litigation, and debtor determined that $137,500 was not enough to cover its litigation and execution risks related to landlord's claim.

iii. ***In re Clouter Creek Reserve, LLC*, 669 B.R. 764 (Bankr. D.S.C. 2025)**

Issue: Whether motion by single asset real estate debtor for DIP financing should be granted.

Holding: Chapter 11 debtor, a "single asset real estate" entity that owned two parcels of land, made reasonable efforts to obtain postpetition financing from other potential lenders on more favorable terms, as factor in determining whether Bankruptcy Court should authorize debtor's request for debtor-in-possession (DIP) financing on superpriority basis. Debtor's principal identified at least four lenders from which debtor sought financing, both prepetition and postpetition, and testified that particular individual had contacted 50 to 60 banks on debtor's behalf prepetition but none of those banks offered credit on unsecured or junior secured basis or on better terms than DIP loan except for one offer that ultimately was rescinded, and, despite property's alleged equity cushion, certain factors made obtaining financing unusually difficult, including debtor's lack of unencumbered property, prior association with a person indicted for murder, and legal dispute with creditor. In this case, equity cushion of real property owned by Chapter 11 debtor that sought to

develop its two parcels of land into a marina and single-family housing, provided adequate protection to existing secured creditors whose liens were being subordinated. As factor in determining whether Bankruptcy Court should authorize postpetition financing on superpriority basis, where, in light of property's $15.4 million "as is" market value, based on qualified expert appraiser's analysis of comparable sales in metropolitan area, and total secured debt of approximately $6.5 million, debtor estimated that its equity in the property would be approximately $8.89 million, such that even the most junior lien was being protected by 58% equity cushion, and even using lowest price per highland acre from adjusted comparable sales reported in appraisal, and subtracting higher amount for remaining development "soft costs," left equity cushion of roughly 54%. Proposed DIP financing was not a "sub rosa" plan or plan in fact, as factor in determining whether Bankruptcy Court should authorize postpetition financing on superpriority basis for the following reasons: (i). proposed DIP loan represented a small fraction of the estate's total value, (ii) DIP loan made reorganization possible but it did not dictate how plan of reorganization needed to be, DIP loan gave debtor more options for how to proceed than in the absence of the financing, in which case liquidation was the only option, and (iii) although DIP arrangement would allow for subordination of objecting prepetition creditors' liens on the property, it did not take away creditors' rights to vote on debtor's plan of reorganization.

iv. ***In re Urban Commons West LLC*, 668 B.R. 42 (Bankr. S.D.N.Y. 2025)**

Issue: Whether debtor can sell long-term lease interests free and clear of junior lien.

Holding: Under "realistic possibility" standard, Code § 363(f)(5) permitting sale free and clear of entity's interest in estate property if such entity could be compelled, in a legal or equitable proceeding, to accept money satisfaction of such interest, encompasses not any conceivable hypothetical proceeding that might compel interest holders to accept a money satisfaction, but only proceedings that might realistically be brought in the case before the court if the automatic stay were lifted or did not apply. In most cases, this would include either foreclosure proceedings or Uniform Commercial Code (UCC) sales. Chapter 11 debtors that owned long-term leasehold interests in hotel could sell their interests free and clear of all liens and other interests since, under New York law, a foreclosure sale would extinguish objecting junior holder's lien.

v. ***In re Weiss Multi-Strategy Advisers LLC*, 665 B.R. 578 (Bankr. S.D.N.Y. 2024)**

Issue: Whether Chapter 11 debtor could sell certain rights and claims related to Portuguese bonds by private sale and whether secured creditor could credit bid?

Holding: Although Code § 363(b) governing the sale of assets outside the ordinary course of business does not specify a standard for determining when it is appropriate for court to authorize the use, sale, or lease of property of the estate, bankruptcy courts generally authorize sales of debtor's assets so long as debtor can articulate sound business justification for doing so. Determination that there are sufficient business reasons to justify particular sale of assets of estate depends on facts and circumstances of each case; however, courts may consider, where relevant, factors such as (1) proportionate value of asset to estate as whole, (2) amount of time elapsed since filing, (3) likelihood of proposing and confirming plan in near future, (4) effect of proposed sale on

any reorganization, (5) sale price to be obtained with reference to any appraisals of property, (6) alternative uses of property, and (7) whether asset is increasing or decreasing in value. In this case, Chapter 11 debtor-financial services companies' proposed private sale of their rights, claims, and causes of action related to Portuguese bonds they had purchased in secondary market, as opposed to public auction of the bonds, was appropriate and would be approved by the Bankruptcy Court for the following reasons: (i) the debtors acted consistently with the Court's sale guidelines in proposing the private sale, (ii) the debtors explicitly disclosed that transaction involved private sale, rather than public auction, (iii) the debtors engaged in lengthy effort to sell the bonds, (iv) the debtors explained in extensive detail why they elected a private sale and how it would maximize value for debtors' estates, and, (v) while the Court was cautious in approving a private sale of significant assets, particularly where creditors were likely to face a substantial shortfall in any plan distributions, the Court did not believe that sale of bonds via auction would yield greater value.

Regarding the right of the secured creditor to credit bid pursuant to Code § 363(k), the secured creditor's right to credit bid is not absolute, and the determination of what constitutes "cause" for bankruptcy court to deny secured creditor the right to credit bid, which Bankruptcy Code does not define, is made on case-by-case basis. In this case, creditors would not be allowed opportunity to credit bid, because although creditors were indisputably debtors' "biggest creditors," the validity of creditors' liens was hotly contested, debtors had filed adversary complaint as to which creditors' motion to dismiss had been denied to the extent the complaint sought to avoid creditors' security interest as a preferential transfer, creditors had already been offered the bonds in debtors' effort to reduce any indebtedness owed but were uninterested, creditors had not established that they could offer the all-cash bid sought by debtors, and the Bankruptcy Court had found that debtors' proposed transaction, conducted as a private sale, was permissible.

vi. ***In re The Roman Catholic Diocese of Rockville Centre*, 665 B.R. 71 (Bankr. S.D.N.Y., 2024)**

Issue: Whether four settlement agreements for the sale of assets should be approved**.**

Holding: While settlements or compromises are favored in bankruptcy and, in fact, encouraged, a court determining whether to approve a proposed settlement must first determine that the settlement is fair and equitable and in the best interests of the estate. In this case, the proposed sale of insurance policies to insurers, pursuant to settlement agreements with Chapter 11 debtor, a Roman Catholic diocese, additional assureds, including debtor's parishes, and insurers, relating to claims of sexual abuse survivors, was within business judgment of debtor for the following reasons: (i) the proposed sale of policies pursuant to the settlement agreements would result in payment of $85.525 million towards funding of settlement trust for the benefit of abuse survivors, (ii) the settlement amount was the product of a court-ordered mediation that debtor submitted was conducted in good faith and at arm's length, (iii) funds from the settlement amount would be immediately available to pay creditors, and (iv) the settlement resolved highly contentious and costly insurance coverage actions pending in District Court, which debtor indicated involved fact-intensive issues that would likely require resolution on a claim-by-claim basis.

Additionally, In determining whether a settlement agreement is a sub rosa plan, courts will consider a number of factors, including whether (1) the agreement has the practical effect of dictating the debtor's reorganization, (2) the agreement infringes creditor voting rights on the

debtor's reorganization, (3) the agreement disposes of large assets belonging to the debtor, and (4) the agreement forced creditors to waive their claims against the debtor. In this case, the proposed settlement agreements relating to claims of sexual abuse survivors, were not a sub rosa plan because the settlement agreements did not dictate plan distributions, dispose of all debtor's assets or circumvent voting. Instead, a condition precedent to the effectiveness of the settlement agreements was confirmation of the plan, which itself was dependent on claimants voting to accept the plan.

vii. ***In re Byju's Alpha, Inc.*, 661 B.R. 109 (Bankr. D. Del. 2024)**

Issue: Whether court should issue temporary retraining order against Chapter 11 debtor's sole director.

Holding: Bankruptcy Code provision authorizing court to issue "necessary or appropriate" orders gives the court general equitable powers, but only insofar as those powers are applied in a manner consistent with the Code. Plaintiff must prove three elements by clear and convincing evidence to establish that a party is liable for civil contempt: (1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order. In this case, transferee's and its principal's failure to comply with Bankruptcy Court's orders to produce information warranted imposition of civil contempt sanctions and civil confinement, in Chapter 11 debtor's adversary proceeding asserting claims for fraudulent transfer relating to debtor's purported investment in transferee for the following reasons: (i) the debtor's director had knowledge of the Court's orders, (ii) Court provided warnings regarding possibility of sanctions, (iii) there was no reason that might justify the refusal of transferee and its principal to follow the Court's orders, and (iv) both monetary sanctions and civil confinement were the least coercive sanctions available, particularly given principal's refusal to appear at show-cause hearing, his failure to provide any proof of his alleged hospitalization, and his outright refusal to provide the information he was ordered to produce.

P. DISCLOSURE STATEMENT

i. ***In re St. Margaret's Health—Peru*, 659 B.R. 691 (Bankr. N.D. Ill. 2024)**

Issue: Whether conditional approval of disclosure statement was permissible.

Holding: Combined hearings on disclosure statement and proposed Chapter 11 plan are not limited to small business cases, as Bankruptcy Code contains no such prohibition. Instead, Code provides for combined hearings that promote economical and expedited resolution. In this case, combined hearing, on adequacy of disclosure statement relating to liquidating plan proposed by Chapter 11 debtors and unsecured creditors committee and plan confirmation, was warranted for expeditious and economical resolution of case, following bankruptcy court's conditional approval of disclosure statement, for the following reasons: (i) debtors had limited resources available for exiting Chapter 11, (ii) debtors' employees in leadership positions would be leaving soon, (iii) combined hearing would minimize administrative expenses, (iv) objection to combined hearing by United States Trustee was devoid of any argument or analysis of facts and circumstances of case, suggesting that it was because combined hearing was so clearly to benefit of all parties involved, and, importantly, (v) creditors committee supported use of combined hearing. Disclosure statement relating to joint

liquidating plan proposed by Chapter 11 debtors and unsecured creditors committee contained adequate information for the following reasons: (i) statement had sufficient detail to permit informed judgment by parties voting on plan, as debtors developed plan in conjunction with creditors committee, (ii) debtors took comments from other parties in interest, including bank and United States Trustee, (iii) statement had detailed information regarding background of cases and major events occurring during cases, and (iv) statement provided information regarding plan distributions, implementation of plan, and classification and treatment of claims and interests.

Q. CONFIRMATION

i. ***Truck Insurance Exchange v. Kaiser Gypsum Co*., 144 S. Ct. 1414 (2024)**

Issue: Whether insurance company with financial responsibility of a bankruptcy claim may be heard on any issue in a Chapter 11 case, including confirmation of the debtor's plan.

Holding: The Supreme Court reversed and remanded a decision of the Fourth Circuit that denied an objection filed by Truck Insurance Exchange ("Truck") on the grounds that it was not a "party in interest" entitled to file an objection to a Chapter 11 plan. Truck was the primary insurer for companies that manufactured and sold products containing asbestos and was obligated to pay up to $500,000 per asbestos claim covered under its insurance contracts with creditors. Truck had objected to the debtor's Chapter 11 plan on the grounds that the plan lacked certain disclosure requirements that Truck thought could save it from paying millions of dollars in fraudulent claims. The Fourth Circuit held that Truck was not a "party in interest" because the reorganization plan was "insurance neutral" in that it neither increased Truck's pre-petition obligations nor impaired its rights under insurance contracts. The Supreme Court concluded that Code § 1109(b) which is the section dealing with the "right to be heard" in a Chapter 11 case states as follows:

> A party in interest, including the debtor, the trustee, a creditor's committee, an equity security holder's committee, a creditor, an equity security holder, or any indentured trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b).

The Court concluded that an "insurer with financial responsibility for a bankruptcy claim is sufficiently concerned with, or affected by, the proceedings to be a 'party in interest' that can raise objections to a reorganization plan." Code § 1109(b) "simply provides them a voice in the proceedings." (Id. at *2). The Court concluded that the Bankruptcy Code enacted in 1978 "constituted an effort to encourage and promote greater participation in reorganization cases." (Id. at *10, quoting *In re Amatex Corp*., 755 F.2d 1034, 1043 (3rd Cir. 1985). The Court also concluded that the purpose of Code § 1109(b) enabled a broad participation that promoted a fair and equitable reorganization process. Under multiple sections of the Bankruptcy Code, a "party in interest" enjoys certain rights in reorganization proceedings, including the ability to file a Chapter 11 plan when a trustee has been appointed, request the appointment or removal of a trustee, challenge the good faith of persons voting to approve a plan, and object to confirmation of a plan.

ii. ***In re AIO US, Inc.*, 672 B.R. 261 (Bankr. D. Del. 2025)**

Issue: Whether debtor's solicitation procedures for confirmation of Chapter 11 plan was acceptable.

Holding: Solicitation procedure providing for temporary allowance of claims asserted by various talc claimants for voting purposes was appropriate. Bankruptcy Rules, though not the Bankruptcy Code itself, expressly contemplated a mechanism by which claims could be temporarily allowed for voting purposes only. The ballots, in light of the changes that had been made in response to other objections, provided the principal protections that would otherwise be afforded by the filing of proofs of claim. Ojector-insurers did not identify any substantive protection that would be afforded by requiring a proof of claim that was absent under debtors' proposed solicitation procedures.

iii. ***In re Kaiser Gypsum Co., Inc.*, 135 F.4th 185 (4th Cir. 2025)**

Issue: Whether Chapter 11 plan satisfied Code § 524(g) requirements for an asbestos driven reorganization.

Holding: This case returns on remand from the Supreme Court following its holding that Truck Insurance Exchange is a party in interest as to the Chapter 11 reorganization plan (the "Plan") proposed by Kaiser Gypsum Co., Inc., and Hanson Permanente Cement, Inc. (the "Debtors"). *See Truck Ins. Exch. v. Kaiser Gypsum Co.*, 602 U.S. 268, 285, 144 S.Ct. 1414, 219 L.Ed.2d 41 (2024).

In its original decision, the District Court went beyond the party-in-interest issue and also considered Truck's substantive objections to the Plan. Ultimately, the court concluded that the Plan (1) was proposed in good faith, as required by 11 U.S.C. § 1129(a)(3), and (2) satisfied the various requirements for approval in 11 U.S.C. § 524(g). The Supreme Court determined that Truck is a party in interest, and on remand, the 4th Circuit reviewed the merits of the District Court's independent holdings. The 4th Circuit find no reversible error in either of the District Court's conclusions: that the Plan was proposed in good faith, and that it satisfies Code § 524(g)'s various requirements. The joint Chapter 11 plan proposed by debtors, former manufacturers and sellers of asbestos-containing products, satisfied the Bankruptcy Code's voting-shares requirement for asbestos-driven reorganization plans. Further the trust established by the plan to resolve debtors' present and future asbestos liabilities was "entitled to own" reorganized debtors' equity if a specified contingency occurred, namely, if debtors defaulted on five-year, $1 million note they issued to fund contained within the plan.

iv. ***In re Murray Energy Holdings Co.*, 665 B.R. 347 (Bankr. S.D. Ohio, 2024)**

Issue: Whether malpractice claim was barred by provisions in debtor's Chapter 11 plan.

Holding: Exculpation clause in debtors' confirmed Chapter 11 plan applied to, and barred, legal malpractice claim brought by executrix of estate of debtor's principal and trustee of principal's trust against law firm that represented debtors as local bankruptcy counsel and certain of its current or former partners, alleging that firm, which also represented principal, his wife/executrix, and their trusts in personal matters, failed to disclose its conflict of interest and breached its duties by

exposing plaintiffs to ERISA withdrawal liability. Plaintiffs were suing defendants in their capacity as debtors' counsel, making defendants exculpated parties under plan, as complaint specifically alleged that defendants harmed plaintiffs by helping to "negotiate" plan that exposed them to "billions of dollars in claims," and malpractice claim was not only "related to," but expressly predicated on, defendants' alleged role in negotiating and advocating for confirmation of plan. Additionally release contained in debtors' confirmed Chapter 11 plan covered legal malpractice claim because release, which released firm from claims "relating to" debtors, plan, or "pursuit of confirmation," was a consensual provision, as plaintiffs had affirmatively agreed to be "Releasing Parties" and thereby release claims against firm as consideration for being included as "Released Parties" themselves, and in any event release had been found to be integral and non-severable element of plan, which had been substantially consummated four years prior. Additionally, "carveouts" from confirmed Chapter 11 plan's exculpation clause and release consisting of exceptions for "actual fraud, willful misconduct, or gross negligence" did not apply to claim for the following reasons: (i) plaintiffs' complaint did not mention "actual fraud," (ii) plaintiffs' assertions that defendants engaged in "willful misconduct" and "gross negligence" by failing to disclose conflict of interest and breaching their duties by exposing plaintiffs to significant ERISA withdrawal liability amounted to conclusory legal allegations entitled to no weight, and (iii) those factual allegations that plaintiffs did make were insufficient to establish conduct by defendants that rose to level of willful misconduct or gross negligence. Also, fee application order, in which the Bankruptcy Court found that law firm employed as Chapter 11 debtors' local bankruptcy counsel and its partners were "disinterested," as required to be employed by debtors-in-possession, did not bar, at the motion-to-dismiss stage, subsequent legal malpractice claim brought against firm and certain of its current or former partners by executrix of estate of debtor's principal and trustee of principal's trust alleging, inter alia, that firm had an undisclosed conflict of interest.

v. ***In re Eletson Holdings, Inc.*, 664 B.R. 569 (Bankr. S.D.N.Y. 2024)**

Issue: Which of the competing plans should be approved.

Holding:
Under Coltex, 138 F.3d 39, "new value plan" proposed by Chapter 11 debtors, which provided for return of 100% of equity of reorganized debtor to debtors' existing shareholders in exchange for funding provided, in part, by shareholders' contribution of $37 million cash plus "collections contribution" made up of set percentages of net cash recoveries under final arbitration award and $40 million escrow did not satisfy "new" and "money or money's worth" requirements of new value exception to absolute priority rule and so could not be confirmed. Although $37 million cash contribution was potential new value, collections contribution was not "new" to the extent it came from entity that was within debtors' capital structure, nor was collections contribution "money or money's worth" since it was not a present contribution, because whether arbitration award would ever be collected was unclear at best and related $40 million escrow was a guaranty that might never be transformed into cash. Also Tt satisfy the new value exception to the absolute priority rule, debtor seeking confirmation of Chapter 11 plan must market-test a proposed transaction in order to demonstrate that the purported new value was necessary for a successful reorganization and reasonably equivalent to the property that "old equity" was retaining or receiving, and was not merely an exclusive opportunity for old equity to gain advantages at the expense of creditors. Further, creditors preferred a competing plan with its significantly higher implied valuation of

reorganized debtor, and even using debtors' valuation, shareholders' contribution constituted a more than 50% discount compared to value of equity.
Competing "equity rights" plan proposed by petitioning creditors in debtors' jointly administered Chapter 11 cases, which primarily would be funded through $53.5 million equity rights offering providing holders of general unsecured claims with subscription rights to purchase up to 75% of equity of reorganized debtor at discounted price, was proposed in good faith, as required for confirmation. Petitioning creditors were valid noteholders, their plan, proposed after debtors let their exclusivity periods lapse, complied with applicable provisions of the Bankruptcy Code and provided more funding than debtor's proposed plan, and, in its earlier opinion, the Bankruptcy Court had considered and rejected debtors' arguments regarding petitioning creditors' alleged bad faith. Further the plan was feasible as follows: plan provided sufficient funding to meet all effective date obligations, petitioning creditors escrowed $43.5 million in cash to fund plan, and debtors did not genuinely dispute feasibility of plan but, instead, raised arguments wholly irrelevant to the Bankruptcy Code's feasibility analysis. Also, the competing plan met Bankruptcy Code's confirmation requirements and received overwhelming majority of votes from impaired classes of claims, that is, 65 votes, compared to 22 votes for debtors' plan and 29 votes for a third plan, and debtors' argument that their plan received the most votes was based on faulty assumptions, including that votes of creditors whose claims had been objected to would not be counted and that creditor preferences, some of which appeared to have been cast improperly, should be considered, as opposed to pure creditor votes/acceptances.

vi. ***In re NESV Ice, LLC*, 661 B.R. 427 (Bankr. D. Mass. 2024)**

Issue: Whether debtor's Chapter 11 plan can be confirmed.

Holding:

Secured creditor with junior lien had right to vote its claim as to proposed joint Chapter 11 plan over opposition by assignee of senior lender, notwithstanding prepetition subordination agreement providing that senior lender could, inter alia, vote upon matters that secured creditor, as subordinate lender, could vote. Given plan's proposed treatment of assignee's claim, it was not reasonably necessary or appropriate for senior creditor to vote junior creditor's claim to effect its rights under the agreement, as its rights with respect to the senior debt constituting its claim were not impaired by any act of junior creditor. Although Code § 510(a) generally provides that a subordination agreement is enforceable in a bankruptcy case to the same extent that such agreement is enforceable under applicable nonbankruptcy law, provisions in such an agreement cannot invalidate other applicable provisions of the Code.

When a joint plan of reorganization is proposed in a multi-debtor Chapter 11 case, Code § 1129(a)(10) setting forth the "accepting impaired class" requirement for confirmation of Chapter 11 plans permits confirmation of such plan where at least one class of impaired creditors of one debtor has accepted the plan under certain discrete circumstances, that is, where the plan meets all other requirements for confirmation, and where only limited consolidation is proposed as a good faith means of implementing the plan. In other words, the correct approach is the "per plan" approach, whereby only one class of impaired claims is required to accept the plan, even if that class asserts claims against only one of the debtors, as opposed to the "per debtor" approach under which an impaired but consenting class for each debtor is required.

Secured creditor holding junior mortgages on most of Chapter 11 debtors' properties was not a non-statutory insider and so could vote to accept proposed joint plan of reorganization, even though creditor, a lending platform established by regional development center for EB-5 loan to debtors' parent company to construct entertainment complex, had unique history with debtors due to relationships maintained by insiders of each that affected origination and administration of loan that formed basis for creditor's claim.

Proposed joint plan of reorganization of seven Chapter 11 debtors organized to develop, construct, and operate a sports complex satisfied the "best interests of creditors" test for confirmation, as to two objecting creditors.

Doctrine of marshaling would not be applied, in jointly administered Chapter 11 cases of seven debtors organized to develop a sports complex, to require that assignee of lender that provided senior financing to "land debtors" and construction financing for other debtor's ice-skating rink be paid first from proceeds of collateral of land debtors, which were not obligated to rink's general contractor, so that general contractor, which only had a claim against debtor-rink owner, would be secured in a hypothetical liquidation. No traditional exception to "common debtor" requirement for marshaling applied, and although general contractor asserted that because plan effected a substantive consolidation all debtors should be treated as "common debtors" for marshaling purposes, in a hypothetical liquidation the plan would not be effective, so "plan consolidation" would not support a marshaling claim, and no other basis for substantive consolidation was argued.

In absence of efficient market to establish interest rate for proposed Chapter 11 "cramdown" plan, bankruptcy court must use formula approach based on risk-free loan, subject to adjustment for risk factors.

Proponents of a Chapter 11 plan must demonstrate the "indubitable equivalence" required for "cramdown" under the same preponderance-of-the-evidence standard applicable to the other requirements for plan confirmation, not by clear and convincing evidence.

Courts generally consider the following factors to assess the feasibility of a proposed Chapter 11 plan: (1) adequacy of capital structure, (2) earning power of the business, (3) economic conditions, (4) ability of management, (5) probability of continuation of the same management, and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable the performance of plan provisions. Additionally, when a Chapter 11 debtor proposes to fund a plan out of operating revenue, its financial record during the pendency of the case is probative of plan feasibility, and income projections indicating financial progress must be based on concrete evidence of financial progress, and must not be speculative, conjectural, or unrealistic predictions.

While "good faith," as required for confirmation of a Chapter 11 plan, is not defined, it is generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.

Plan of reorganization proposed in jointly administered Chapter 11 cases of seven debtors organized to develop a sports complex did not "discriminate unfairly" and was "fair and equitable" with respect to each dissenting class and so met the Bankruptcy Code's requirements for "cramdown" with respect to assignee of senior lender. Additionally, the plan was feasible and was filed in good faith.

R. CONFIRMATION--PLAN TERMS

i. ***Harrington v. Purdue Pharma L.P.*, 603 U.S. --- , 144 S.Ct. 2071, 219 L. Ed 2d 721 (June 27, 2024)**

Issue: Whether debtor's Chapter 11 plan can release third party claims.

Holding: The Supreme Court reversed the Second Circuit, ruling that the Bankruptcy Court cannot confirm a reorganization plan that extinguishes claimants' rights against a non-debtor third party. The controversy stemmed from Purdue's bankruptcy as a result of opioid litigation. During the bankruptcy, the Sackler family, which had dominated Purdue's operations for decades, sought to release itself from opioid claims and asked the Bankruptcy Court for a judicial order releasing the family from all opioid-related claims and barring claimants from bringing these claims in the future. The Bankruptcy Court approved the plan with this order included. After a series of conflicting decisions by the District Court and the Second Circuit, the Supreme Court determined that the Bankruptcy Court exceeded its powers under the Bankruptcy Code by confirming a plan that extinguished claimants' rights without obtaining their consent. In doing so, the Court rejected the Sackler's argument that Code § 1123(b)(6), a "catch-all" provision, provided such power. Interpreting the provision in context of the preceding provisions, the Court wrote that all the previous provisions dealt with the rights and responsibilities of debtors and authorize the Bankruptcy Court to adjust claims without consent only if it impacts the debtor. Allowing a court to alter the rights of claimants against a non-debtor appears out-of-step with those other provisions. In addition, allowing the court to confirm such a plan functionally permits the Sackler family to discharge its debts without filing for bankruptcy.

Purdue Pharma appears to resolve at least two aspects of the circuit split on nonconsensual nondebtor releases and injunctions. First, as the dissent succinctly described it, the opinion holds that non-debtor releases of non-derivative claims "are categorically impermissible as a matter of law." This would seem to reverse at least the seminal cases such as A.H. Robbins and Dow Corning. In re A.H. Robins Co, Inc. 880 F.2d 694 (4th Cir. 1989); In re Dow Corning Corp, 280 F.3d 648 (6th Cir. 2002).

It no longer matters how essential the released parties' contribution may be to the reorganization nor what percentage of creditors approved the plan. Nor does it matter the extent of the release or whether it is akin to a "discharge." The rationale of the opinion did not hinge on the releases being contradictory to Code § 524(e) although the language of the opinion repeatedly referred to the release and injunction as effectively being a "discharge." Second, the opinion seems to uphold a plan's settlement of "creditors' 'derivative claims' against nondebtors under paragraph [1123(b)] (3)," which the opinion suggested is permissible "because those claims belong to the debtor's estate."

Two large issues remain. First is the effect of the opinion and holding on what have been called "exculpation" provisions that release or enjoin claims that might be asserted against the debtor's professionals and employees for actions related to the reorganization. Some circuits had upheld such provisions on a lower standard than they would apply to a release of third party liabilities that are unrelated to the reorganization process, E.g., *In re Airadigm Communications, Inc.* 519 F.3d 640, 657 (7th Cir. 2008), and thus some circuits that do not allow third party releases may approve

of exculpation provisions. *E.g., Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020) ("no one [in the *Pardue Pharma* case] questions" that plans may address such "claims derivatively asserted by another on [the debtor's] behalf.").

The Purdue Pharma opinion does not expressly consider exculpation provisions and they may be permissible to the extent that they can be deemed to belong to the debtor." Nothing in the opinion expressly supports exculpation provisions to the extent they are not derivative and do not also "belong to the debtor's estate." Cases authorizing such exculpation provisions may need to be reconsidered in light of Purdue Pharma's focus on whether the claim belongs to the debtor or the estate and its apparent disregard of Code § 524(g) as the appropriate analytical framework.

The second remaining issue is what are the kind of "derivative" claims that can permissibly be released. The language of the majority opinion seems to imply that the "derivative" claims it refers to are only classic shareholder derivative claims; claims that in the first instance belong solely to the corporation that may be asserted by others only derivatively on its behalf, i.e., a "substantive claim [that] belongs to the corporation" such as a claim for breach of fiduciary duty owed to the corporation. That seems to be the only kind of "derivative" claim the opinion references by its quotation of J. Macey, *Corporation Laws* referring to claims where "the named plaintiff is only a nominal plaintiff." 2 J. Macey, *Corporation Law* § 13.20[D], p. 13-140 (2020-4 Supp.). But the preceding sentence in the opinion referred to claims that belong to the "debtor's estate," which includes avoidance actions that never belonged to the nondebtor corporation. The First Circuit decision cited by the opinion also references such avoidance actions as being "derivative" in nature, even though they belong in the first instance to the creditors and can be asserted only derivatively by the estate pursuant to Code §§ 544 or 548. *In re Ontos, Inc*., 478 F.3d 427, 433 (1st Cir. 2007) (the court distinguishes alter ego and successor liability claims as generally not being derivative because a corporation generally cannot pierce its own veil.).

ii. In re Boy Scouts of America, 137 F.4th 126 (3rd Cir. 2025)

Issue: Whether Chapter 11 plan could be approved with release of third parties.

Holding: Under *Purdue Pharma*, 144 S.Ct. 2071, confirmation order's judgment-reduction clause, coupled with Chapter 11 plan of non-profit youth-development organization and its affiliate which contained nonconsensual third-party releases and compensated abuse claimants through settlement trust funded primarily by proceeds of sale of debtors' liability insurance policies back to "settling" insurers, impermissibly released and enjoined contribution and indemnity claims that debtors' non-settling insurers could otherwise have asserted against settling insurers. Although arrangement usually would have posed no problem for a non-settling insurer because, if it obtained judgment against a settling insurer, its liability to trust would have been offset accordingly, if abuse claimant elected tort system alternative there was scenario in which non-settling insurer would not have been compensated in full for its extinguished claims without its consent.

iii. *In re Red River Talc, LLC*, 670 B.R. 251 (Bankr. S.D. Tex. 2025)

Issue: Whether Chapter 11 plan should be approved in a case involving the Texas Two Step

Holding: Prepetition vote by which 83% of talc personal injury claimants purportedly supported Chapter 11 plan to be proposed by debtor, an entity that was to be formed via corporate restructuring under Texas divisional merger statutes to assume manufacturer's talc-related liabilities, could not be certified due to significant voting and solicitation irregularities, and so the requisite 75% claimant support needed for plan with channeling injunction was not met. Although "Option B" of master ballots allowed attorneys to vote on behalf of their clients if attorney could certify authority under power of attorney to vote, and firms collectively purported to vote on behalf of more than 25,000 claimants under Option B, most such votes were not supported by the specific power of attorney required, attorneys' engagement letters did not give them express authority to vote, and by voting, attorneys, without realizing it, were likely settling claims without client approval.

Also, Even if the case were a "full pay" case, Chapter 11 plan proposed by debtor, which purported to release claims against hundreds of nondebtor third parties related to manufacturer without giving voters any opportunity to opt in or opt out of the releases, contained impermissible nonconsensual third-party releases; as noted in *Harrington v. Purdue Pharma L.P.,* 144 S.Ct. 1071. No express section of the Bankruptcy Code allowed nonconsensual third-party releases, Code § 1126 authorizing courts to issue any order necessary or appropriate to carry out the provisions of title 11 did not justify granting such releases, and the releases could not be approved pursuant to even narrower authority of the All Writs Act.

iv. ***In re Engineering Recruiting Experts, LLC*, 673 B.R. 32 (Bankr. M.D. Fla. 2025)**

Issue: Whether preliminary injunction extending automatic stay to Chapter 11 debtor's non-debtor owner was proper.

Holding: Although permanent injunctions are prohibited under the Bankruptcy Code provision stating that the discharge of a debt of the debtor does not affect the liability of any other entity for such debt, temporary injunctions are not and may be warranted in certain circumstances: (1) when the non-debtor and the debtor enjoy such an identity of interest that the suit against the non-debtor is essentially a suit against the debtor, or (2) when the third-party action will have an adverse impact on the debtor's ability to accomplish reorganization. The traditional four-factor test for a preliminary injunction requires the injunction proponent to show that: (1) it has a substantial likelihood of success on the merits; (2) it will suffer an irreparable injury unless the injunction is granted; (3) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party; and (4) the injunction would not be adverse to the public interest. In this case, Chapter 11 debtor, which was an engineering recruiting business, established a substantial likelihood it would complete its plan payments and receive a discharge, supporting confirmation of the preliminary injunction, as part of the reorganization plan, extending the automatic stay to debtor's owner. Owner was the sole owner of debtor and also the only individual responsible for generating new business and attracting clients, continued collection on business debts would ultimately proceed to lawsuits against owner, and owner's defense of those lawsuits would significantly divert his attention from critical business functions, leaving the business vulnerable and susceptible to collapse and closure. The debtor satisfied plan feasibility under the heightened standard, owner's testimony at confirmation demonstrated his business acumen and familiarity with debtor's finances, and debtor timely made all payments post-petition and pre-confirmation and timely filed monthly operating reports. Furthermore, harm of debt collection efforts against Chapter

11 debtor's owner outweighed potential prejudice to creditors of extending the automatic stay to owner, supporting confirmation of preliminary injunction, as part of reorganization plan, extending the automatic stay to owner. The debtor's operations as an engineering recruiting business would likely cease, which would harm not only debtor but creditors, while on the other hand, the injunction would merely delay the enjoined creditors from collecting against owner, and creditors would be able to pursue any claims against owner following debtor's discharge after completing the five-year unsecured payment schedule, after which owner could be better situated to pay a meaningful distribution.

v. ***In re Credito Real*, 670 B.R. 150 (Bankr. D. Del. 2025**

Issue: Whether plan release contained in Mexican-court approved "concurso" plan was enforceable in the United States

Holding: Principles of comity are particularly compelling in bankruptcy context, where United States courts have long recognized need to extend comity to foreign bankruptcy proceedings, since equitable and orderly distribution of debtor's property requires assembling all claims against the limited assets in single proceeding; if all creditors cannot be bound, then plan of reorganization will fail. For a bankruptcy court to enforce an order of a foreign court in an insolvency proceeding, relief that is granted in the foreign proceeding does not have to be identical to relief that might be available in a proceeding in the United States; instead, courts should look to the fairness of the foreign proceeding. In examining procedural fairness of foreign main proceeding, for purposes of determining whether order of foreign court should be enforced in light of Chapter 15's public policy exception, among factors bankruptcy courts may consider are whether: (1) creditors of the same class are treated equally in the distribution of assets, (2) liquidators are considered fiduciaries and are held accountable to the court, (3) creditors have the right to submit claims which, if denied, can be submitted to bankruptcy court for adjudication, (4) liquidators are required to give notice to debtor's potential claimants, (5) there are provisions for creditors' meetings, (6) foreign country's insolvency laws favor its own citizens, (7) all assets are marshaled before one body for centralized distribution, and (8) there are provisions for an automatic stay and for lifting of such stays to facilitate the centralization of claims. Supreme Court's analysis in *Harrington v. Purdue Pharma*, 144 S. Ct. 2071, in holding that Chapter 11 plan cannot provide for nonconsensual third-party release of claims against non-debtor, does not change the way bankruptcy courts should interpret Chapter 15 "catchall" provisions empowering courts to grant appropriate relief and to provide additional assistance upon recognition of a foreign proceeding, based on plain language of Code §§ 1505 and 1521(a)(7) and canons of statutory interpretation. In contrast to catchall section in Code § 1123(b)(6) relied upon by the Purdue Court, which enumerates relief Chapter 11 plans may provide, is limited to matters concerning the debtor, and directs courts to look to rest of Code to determine whether a provision is appropriate. Chapter 15 catchalls afford courts a broad grant of authority to provide relief while setting out express limitations, bearing in mind guiding principles of comity and cooperation, and nowhere prohibit nonconsensual third-party releases. Furthermore, nonconsensual third-party releases contained in Chapter 15 debtor's Mexican-court-approved "concurso" plan were not manifestly contrary to the public policy of the United States. United States International Development Finance Corporation (DFC), a claimant in debtor's Mexican insolvency proceeding, objected to debtor's concurso plan, but not to the releases, in the Mexican proceeding and only raised concerns about releases on appeal. Also DFC did not object to fairness

of Mexican proceeding, in which it played an active role, nor did it identify a constitutional or statutory right on which debtor's concurso plan impinged. Concurso plan was product of a fair process and of arms'-length negotiations among debtor, recognized creditors, and shareholders, concurso plan's releases were customary and permitted under Mexican law. Concurso plan was approved by majority of recognized creditors, and permitting third-party releases was a policy decision that Congress could and had made.

vi. ***In re The Roman Catholic Diocese of Syracuse, New York*, 667 B.R. 628 (Bankr. N.D.N.Y. 2024)**

Issue: Whether "opt-out" third party release for sexual abuse claims were appropriate.

Holding: Whether to allow "opt-out" ballot for third-party releases in Chapter 11 plans is a matter for the bankruptcy court's discretion; accordingly, there is no hard and fast rule on when they would be appropriate, and adequate notice remains critical component of analysis. In this case, proposed "opt-out" mechanism for third-party releases for sexual abuse claims did not make Chapter 11 plan proposed by debtor, a Catholic diocese, and unsecured creditors committee patently unconfirmable in light of *Purdue Pharma*, 144 S.Ct. 2071. Courts in district routinely approve opt-out release language when clear and prominent explanation of same was provided as follows: (i) all claimants subject to opt-out provisions in this mass-tort-like case, as sexual abuse survivors who were represented by fellow survivors sitting on committee, shared commonality characteristics akin to those required in class action, (ii) committee was properly treated as both estate fiduciary and de facto class representative, (iii) some 94% of claimants were represented by sophisticated counsel who had actively participated in case and could explain opt-out process and legal implications to them, (iv) meaningful compensation was expected to be paid in exchange for releases, and (v) requiring opt-in ballot would ignore realities of case.

vii. ***In re Serta Simmons Bedding, LLC*, 125 F.4th 555 (5th Cir. 2024)**

Issue: Whether settlement indemnity provision within proposed Chapter 11 plan should be approved.

Holding: Inclusion, in confirmed Chapter 11 plan, of section providing "settlement indemnity" to creditors, including "prevailing lenders," holding first- and second-out super-priority debt issued in prepetition "uptier transaction" with debtors was an impermissible end-run around Code § 502(e)(1)(B) that requires disallowance of any contingent claim for reimbursement where the entity is co-liable with the debtor. The prevailing lenders had filed proofs of claim for indemnification and contribution related to their participation in the uptier transaction. Those claims were contingent claims for reimbursement where the claiming entities were co-liable with debtors and, as such, were explicitly disallowed by the Code, which also invalidated debtors' related prepetition indemnity, and attempt by debtors and prevailing lenders to resurrect the disallowed indemnity claims in the plan as a "settlement indemnity," on exact same terms and intended to protect same group of lenders, was contrary to Congress's intent. Also, the plan term violated the Code's requirement of equal treatment. Although the plan nominally awarded the settlement indemnity to all members of Classes 3 and 4, expected value of indemnity varied dramatically depending on whether members had participated in the uptier or had acquired their super-priority debt on

secondary markets, with such values ranging from millions or even tens of millions of dollars to little or nothing, and that variance went far beyond "approximate equality."

viii. ***In re Smallhold, Inc.*, 665 B.R. 704 (Bankr. D. Del., 2024)**

Issue: Whether plan with "opt out" third party releases was confirmable**.**

Holding: Consensual third-party releases in a debtor's plan of reorganization are permissible. Creditors generally must affirmatively express consent to a third-party release contained in a debtor's plan of reorganization, such as by checking a box to "opt in," in order to be bound by the release. It is not appropriate to require creditors to object or "opt out," or else be subject to (or be deemed to "consent" to) such release. Absent some sort of affirmative expression of consent to proposed third-party release that would be sufficient as a matter of contract law, creditor's silence in the face of a reorganization plan and form of ballot containing such release is not sufficient. In this case, with respect to third amended plan of reorganization proposed by Subchapter V Chapter 11 debtor, which contained "opt out" third-party releases purporting to release creditors' claims against debtor's representatives, debtor-in-possession (DIP) lender, and DIP lender's representatives, unimpaired equity holders and creditors whose claims would be paid in full and thus were not given the opportunity to vote on the plan could not be said to have validly consented to the releases; although such creditors and equity holders were informed that plan would operate to release their claims against third parties, they never affirmatively expressed consent to the releases, and so, as a matter of ordinary contract law, their silence was insufficient to bind them. Those creditors that voted on the plan, after receiving clear instruction that such vote would operate to grant a release unless they opted out, and that were given a simple mechanism to opt out, namely, a box to check, but elected not to opt out could be deemed to have consented to the release and thus were bound by it, regardless of how they voted. The creditors' vote was affirmative step which, coupled with conspicuous notice of opt-out mechanism, sufficed as consent to the third-party releases under general contract principles. A creditor's vote on proposed plan of reorganization is intended to indicate only whether creditor does or does not accept plan's treatment of creditor's allowed claim.

ix. ***In re Hertz Corp.*, 117 F.4th 109 (3rd Cir. 2024)**

Issue: Whether solvent debtor is required to pay redemption premium and postpetition interest at the contract rate on prepetition unsecured notes

Holding: Bankruptcy Code's prohibition on claims for "unmatured interest" covered make-whole fees composed of interest coupons owed through redemption dates, redemption fee, and present value discount which allowed Chapter 11 debtors to pay off prepetition notes before their redemption dates provided that unsecured noteholders were "made whole" by receiving the present value of profits they would have booked had they been paid off on the redemption dates. Even though make-whole fees did not slowly and steadily accrue over life of notes but, instead, came into being fully formed upon early redemption, they fit the dictionary and caselaw definitions of "interest" as they were "compensation" debtors committed to pay upon a contingency in order to use noteholders' funds, and make-whole fees also were the economic equivalent of interest, as they were mathematically equivalent to unmatured interest noteholders would have received had debtors

redeemed notes on their redemption dates. Bankruptcy Code requires solvent debtors to pay unimpaired creditors interest accruing postpetition at the equitable rate, whatever that may be, which may be the contract rate.

In practical terms, the Bankruptcy Code's "cramdown" process offers plan proponents a choice: compensate creditors in full, leaving them unimpaired, or confirm a plan paying them less (i.e., impairing them) in the face of the Code's substantive and procedural protections for impaired creditors—including the ballot box and the absolute priority rule.

Disallowance of "unmatured interest" by the Bankruptcy Code does not result in impairment but receiving payment in full a few months after confirmation of a Chapter 11 plan renders a creditor impaired.

Bankruptcy Code entitles every creditor—not just the dissenting impaired creditors who can invoke the section of the Code setting forth the absolute priority rule —to treatment consistent with absolute priority absent a clear statement to the contrary. To comply with absolute priority rule, unimpaired noteholders to which solvent Chapter 11 debtors had issued notes prepetition were entitled to postpetition interest at contract rate, as opposed to federal judgment rate, on their allowed claims, and such interest included contractual make-whole fees that accrued post-bankruptcy.

The Third Circuit stated:

> And there is no question that Hertz's proposal—paying the Noteholders a fraction of the interest they were contractually promised, while distributing more than a billion dollars to the Shareholders—is contrary to those objectives and purposes. Once again, "the familiar rule [is] that the stockholder's interest in the [bankrupt company] is subordinate to the rights of creditors.... [A]ny arrangement of the parties by which the subordinate rights ... [are] secured at the expense of ... creditors comes within judicial denunciation. . . . The Code's careful design does not give Hertz enough leverage to subvert that law's foundational goals. We thus affirm in part and reverse in part the Bankruptcy Court's decisions. To comply with the absolute priority rule, and thus fulfill the Plan's promise to "leave[ ] unaltered the [Noteholders'] legal, equitable, and contractual rights[,]" § 1124(1), Hertz must pay the post-petition interest at the Notes' applicable contract rate, including the Applicable Premiums on the 2026 and 2028 Notes.

x. ***Lee v. U.S. Bank National Association*, 102 F.4th 1177 (11th Cir. 2024)**

Issue: Whether Chapter 11 plan can modify mortgage loan**.**

Holding: The Eleventh Circuit affirmed that Code § 1123(b)(5)'s anti-modification provision applied to a creditor's claim on the Debtor's primary residence. The Debtor mortgaged her 43-acre property and a note secured by the deed on the property. The Debtor kept her principal residence on part of the property and leased the rest out as farmland. The Debtor eventually defaulted on the mortgage and sought to restructure this (and other debts) through a Chapter 11 reorganization plan. The Creditor (the mortgage holder) moved for relief from Chapter 11's automatic stay to foreclose on the Debtor's property. The Creditor argued, among other things, that Code § 1123(b)(5)'s anti-

modification provision precluded the Bankruptcy Court from accepting the Debtor's proposed reorganization plan. The Bankruptcy Court agreed that Code § 1123(b)(5)'s anti-modification provision applied because: (1) the creditor's security interest was in real property; (2) the real property was the only security for the debt; and (3) the real property was the Debtor's principal residence. The Eleventh Circuit agreed. In doing so, the Court explicitly rejected other Code § 1123(b)(5) approaches used by other courts. The Court rejected the First Circuit's reading that Code § 1123(b)(5) applied only where Debtor used a property exclusively as a primary residence, *Lomas Mortg. Inc. v. Louis*, 82 F.3d 1, 4-7 (1st Cir. 1996), and rejected the Third Circuit's approach in interpreting "real property that *is* the debtor's principal residence" to mean only or exclusively the debtor's residence and nothing else. *In re Scarbrough,* 461 F.3d 406, 411 (3rd cir. 2006). The Court also rejected a "totality of circumstances" approach in determining whether a property was residential or commercial which has been applied by some courts. *See In re Hock*, 571 B.R. 891, 895 (Bankr. S.D. Fla. 2017); *In re Wages*, 508 B.R. 161, 165 (BAP 9th Cir. 2014), and *In re Brunson*, 201 B.R. 351 (Bankr. W.D.N.Y. 1996). The Court maintained that such balancing is unnecessary where the text is unambiguous.

xi. ***In re German Pellets Louisiana*, 91 F.4th 802 (5th Cir. 2024)**

Issue: Whether Chapter 11 plan discharged indemnity claims of recoupment and setoff.

Holding: The Fifth Circuit affirmed the Bankruptcy Court's holding that affirmative defenses based on a pre-bankruptcy indemnity agreement with the debtor raised in response to a state court claim brought by the trustee of a liquidation trust that was formed after the debtor filed bankruptcy could not be maintained against the claims being brought by the trustee. The debtor filed for bankruptcy culminating in a Chapter 11 confirmation plan that transferred its asserts into a liquidation trust. After the creation of the trust, third parties assigned certain legal claims to the trust that the trustee then pursued in state court. The claims alleged that Raymond James & Associates ("Raymond James") made misstatements to the debtor when helping it to raise funds before debtor's bankruptcy filing. In response, Raymond James asserted that a pre-bankruptcy indemnity agreement that it had entered into with the debtor allowed it to assert these same defenses against the trustee in the current action. The Fifth Circuit found that while Raymond James was not a party to debtor's confirmation plan, it did have actual knowledge of the plan and therefore the plan applied to Raymond James even though it was not listed as a creditor in the bankruptcy petition. Therefore, the next issue was to determine whether the plan discharged Raymond James' pre-petition claims being asserted against the trustee and the Fourth Circuit found that Raymond James' claims for recoupment and setoff were expressly prohibited by the confirmation plan.

xii. ***In re Topp*, 75 F.4th 959 (8th Cir. 2023)**

Issue: Whether 20 year treasury bond rate is appropriate for use as the discount rate in deferred plan payments.

Holding: Future payments must be discounted before adding them up to see whether total equals present value of claim, for purposes of determining whether total present value of future payments to oversecured creditor over Chapter 12 plan period equals or exceeds allowed value of the claim. Discounting is achieved by applying an interest rate that captures the time value of money, often

called the "discount rate." In this case, the Bankruptcy Court did not err in using 20-year treasury bond rate, as opposed to national prime rate, to compute interest rate to be applied to amount of oversecured creditor's allowed claim in Chapter 12 plan confirmed over objection of creditor. The court disagreed with the creditor's argument that the prime rate is *the* rate with which to start and that starting with the treasury rate is legal error, pursuant to the Supreme Court's decision in *Til*l. *Doud* and *Till* are not cases about particular starting rates. They are about the proper approach to satisfy the plan-confirmation requirement that secured creditors receive at least "the value, as of the effective date of the plan," of their claims. To be sure, in *Till*'s wake, most courts start with the prime rate. But *Till* did not make the treasury rate obsolete as a matter of law. *See In re Texas Grand Prairie Hotel Realty, LLC*, 710 F.3d 324, 331 (5th Cir. 2013) ("*Till* was a splintered decision whose precedential value is limited even in the Chapter 13 context."). The treasury rate still persists as a base rate. In this case, the bankruptcy court considered the length of the proposed maturity period, the fact that the secured creditor's claim was substantially over-secured, and the overall risk of nonpayment. It specifically noted that the secured creditor's claim was secured by real estate and that those "types of transactions are generally financed over a longer period of time which justifies use of the treasury bond as the base rate." In the end, the court approved a 4% rate—the treasury rate plus 2% for risk. This 4% rate happens to equal the prime rate of 3.25% plus a modest risk adjustment of 0.75%. By focusing on the starting rate rather than the ultimate rate, the secured creditor failed to show that the bankruptcy court clearly erred in its determination that a 4% rate was sufficient to ensure full payment on "the value, as of the effective date of the plan," of the secured claim.

S. CRAMDOWN—FAIR AND EQUITABLE

i. ***In re Global Fertility & Genetics*, 663 B.R. 584 (Bankr. S.D.N.Y. 2024)**

Issue: Whether plan that paid creditors in full but extinguished all equity interest for no consideration should be approved.

Holding: Debtor, which was a Delaware limited-liability company (LLC), had no equity value on a standalone basis, as would support finding that proposed Chapter 11 reorganization plan's treatment of equity class that would receive nothing was fair and equitable, as required for Bankruptcy Code's cram-down provisions to be satisfied. The debtor had no cash flow and no ongoing operations of its own, and but for continuing equity infusions from majority owner of holding company that was 100% owner of debtor, debtor would be insolvent on an administrative expense basis.

T. POST-CONFIRMATION

i. ***In re Congoleum Corporation*, 149 F. 4th 318 (3rd Cir. 2025)**

Issue: Whether Chapter 11 case should be reopened to determine liability.

Holding: Bankruptcy Court did not abuse its discretion in determining there was "cause" to reopen Chapter 11 case, which had been closed for more than a decade, on motion of debtor's former

corporate sibling seeking a declaration that, under order confirming debtor's reorganization plan, it was not liable for certain environmental claims stemming from operation of debtor's manufacturing facility, even if relief sought by sibling did not affect debtor's estate or administration of its assets. Bankruptcy Court correctly determined that it, not District Court, was best suited to preside over motion, which required careful analysis of case's history, since dispute depended substantially on correct interpretation of particular finding in confirmation order, which Bankruptcy Court was well-positioned to interpret, Bankruptcy Court had presided over a substantially similar dispute in debtor's subsequent bankruptcy case, and District Court had no particular familiarity with issues raised in motion. Regarding the motion, the Bankruptcy Court correctly interpreted the order confirming Chapter 11 debtor's reorganization plan, which included a finding that debtor's former corporate sibling had no responsibility for environmental claims stemming from debtor's manufacturing facility, as barring creditor's claims against the former corporate sibling. The finding clearly provided that various additional insureds, including former corporate sibling, "[had] no responsibility for any of the liabilities of [debtor's flooring business]." The finding was not limited to sibling's responsibility for debtor's liability, but referred broadly to "any of" the business's liabilities, and although plan provided that nothing in confirmation order was to be construed as releasing any entity of any liability under any environmental law, that statement was consistent with finding's determination that sibling was never responsible for debtor's business's environmental liabilities.

ii. ***In re Virgin Orbit, LLC*, 669 B.R. 725 (D. Del. 2025)**

Issue: Whether order confirming Chapter 11 plan should be revoked.

Holding: To demonstrate actual fraudulent intent, of kind warranting revocation of order confirming Chapter 11 plan, movant must establish: (1) that the debtor made a representation regarding compliance with section of the Bankruptcy Code governing confirmation of Chapter 11 plans, which was materially false; (2) that the representation was either known by the debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth; (3) that the representation was made to induce the court to rely upon it; (4) that the court did rely upon it; and (5) that as a consequence of such reliance, the court entered the confirmation order. In determining whether there is fraud on the court warranting revocation of order confirming Chapter 11 plan, the important inquiry is whether the fraud harmed the integrity of the judicial process, not whether the fraud prejudiced a party or caused economic loss. This standard is high to protect the finality of confirmation orders. Also, extraordinary circumstances did not exist for District Court to consider newly discovered evidence consisting of video interview of Chapter 11 debtor's former chief executive officer (CEO) regarding value of intellectual property assets that had been sold to satisfy debt obligations, submitted by pro se equity holder on appeal from Bankruptcy Court's order denying motion to revoke order confirming plan. The value of the assets was irrelevant to the sole issue on appeal, which was whether the Bankruptcy Court erred in determining that equity holder failed to establish that the confirmation order was procured by fraud, and equity holder did not show that the information contained in the video was unavailable to be presented to the Bankruptcy Court.

iii. ***In re Endo International PLC*, 2024 WL 4798828 (Bankr. S.D.NY., Nov. 14, 2024)**

Issue: Whether Chapter 11 case has been "fully administered" for the issuance of a final decree pursuant to Code § 350.

Holding: Bankruptcy courts look to a set of non-exhaustive factors in the Advisory Committee Notes to the Bankruptcy Rule governing the closing and reopening of cases to determine whether a case has been fully administered and must be closed. The factors include: (1) whether the order confirming the plan has become final; (2) whether deposits required by the plan have been distributed; (3) whether the property proposed by the plan to be transferred has been transferred; (4) whether the debtor or successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan; (5) whether payments under the plan have commenced; and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved. In this case, several jointly administered Chapter 11 cases were "fully administered" within meaning of Rule 3022 requiring bankruptcy courts to close cases after estate is fully administered. The cases were fully administered upon consummation of restructuring transactions contemplated under reorganization plan, and plan had been substantially consummated because (i) the confirmation order had become final and non-appealable, (ii) the debtors were no longer operating entities and had not been transferred to purchaser parent, (iii) any property transfers provided by plan had been completed, (iv) the plan administrator or creditor trusts formed pursuant to plan had assumed all obligations of debtors under plan, (v) there were no open adversary proceedings or contested matters, and (vi) the plan administrator or creditor trusts had assumed management of substantially all property dealt with by plan.

iv. ***In the Matter of Highland Capital Management LP*, 102 F.4th 286 (5th Cir. 2024)**

Issue: Whether creditor can amend proof of claim after confirmation of plan.

Holding: The Fifth Circuit affirmed the denial of creditor CLO HoldCo Ltd.'s ("CLO") second amended proof of claim filed after the Debtor's Chapter 11 plan was confirmed. The Court held that creditors must show "compelling circumstances" for post-confirmation amendments, since "a confirmed plan of reorganization is equivalent to a final judgment in civil litigation." The Court further held that under the "compelling circumstances" standard, bankruptcy courts have discretion to weigh multiple equitable factors, including the reason for the delay and whether the delay has caused any prejudice. Here, the Bankruptcy Court found CLO failed to identify any reason for its delay in seeking a post-confirmation amendment, let alone a "compelling" reason. The Fifth Circuit concluded that this unexcused delay alone was a sufficient basis to deny CLO's post-confirmation amendment.

v. ***In re RML, LLC*, 2024 WL 3770047 (Bankr, S.D.N.Y., Aug. 12, 2024)**

Issue: Whether plan injunction and confirmation order were effective to enjoin postconfirmation lawsuits against Chapter 11 debtor alleging injuries by prepetition exposure to asbestos contaminate talc in debtor's products.

Holding: For asbestos-related bankruptcies, and only for such bankruptcies, Congress has provided in the Bankruptcy Code that, notwithstanding the usual rule that a debtor's discharge does not affect the liabilities of others on that same debt, courts may issue an injunction barring any action directed against a third party under certain statutorily specified circumstances. What constitutes reasonable notice to parties whose claims are to be discharged in bankruptcy case principally depends on the status of the parties and whether the creditor is a known creditor or an unknown creditor. While actual notice is required if the creditor is a known creditor, constructive notice is sufficient where a creditor is unknown. In this case, Chapter 11 debtors' publishing general bar date notice in national editions of newspapers satisfied due process requirements as to unknown creditors, including claimants who brought postconfirmation lawsuits against debtors alleging they were injured by prepetition exposure to asbestos-contaminated talc in debtors' products, even though bar date notice did not mention talc.

vi. ***In re Virgin Orbit, LLC*, 659 B.R. 36 (Bankr. D. Del. 2024)**

Issue: Whether equity holders could revoke order confirming Chapter 11 plan

Holding: Res judicata barred any arguments by equity holders, on motion to revoke order confirming Chapter 11 plan of corporate debtor and its affiliates, that debtors did not undertake a fair and proper marketing and sales process and did not sell assets for appropriate value. Equity holders' challenges and critiques of the sales went to the heart of the Bankruptcy Court's findings and conclusions when entering bid procedures order and sales orders, which orders were not appealed and were final, and equity holders had the opportunity to object and be heard at the bidding procedures and sale hearings as parties in interest, but did not object or participate and thus were bound by the results. To show that a confirmation order was procured by fraud, as may warrant revocation of order confirming Chapter 11 plan, movant must demonstrate the following five elements: (1) that debtor made a representation regarding compliance with section of the Bankruptcy Code governing confirmation of Chapter 11 plans which was materially false, (2) that the representation was either known by debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth, (3) that the representation was made to induce the court to rely upon it, (4) that the court did rely upon it, and (5) that as a consequence of such reliance, the court entered the confirmation order. In this case, equity holders failed to demonstrate order confirming Chapter 11 plan of corporate debtor and its affiliates was procured by fraud, as may warrant revocation of confirmation order for the following reason: while equity holders asserted that debtors were dishonest about the value of remaining assets after preconfirmation sales, so that debtors' indirect parent and prepetition senior secured lender could obtain them without equity holders receiving their fair share, equity holders did not identify with precision any alleged false representations or submit evidence to show that statements were materially false, but rather, value of debtors' assets had been determined by the marketplace after an open and fair sale process overseen by the Bankruptcy Court, with not enough value in the estates to allow equity holders to obtain a recovery, which was an unfortunate, typical result in bankruptcy cases.

U. APPEAL

i. ***Fantasia v. Diodato*, 154 F. 4th 1123 (9th Cir. 2025)**

Issue: Whether order granting relief from stay and abstention was final order for appeal**.**

Holding: Bankruptcy Court's order reimposing the automatic stay, and vacating its earlier order granting creditor-trustor's motion for relief from stay and for permissive abstention in order for creditor to continue state court litigation against Chapter 13 debtor-trustee alleging misuse of property in irrevocable trust, was a "final" order for purposes of determining whether creditor's appeal to District Court was timely, even though order did not, strictly speaking, grant or deny a party relief from stay, because it definitively disposed of a discrete dispute, altering the status quo and fixing the rights and obligations of the parties. Also, statutory prohibition against review of permissive abstention decision by Court of Appeals did not apply to bar the Court of Appeals from reviewing whether creditor's appeal to the District Court was timely and thus whether the District Court had jurisdiction to consider it; the parties did not challenge, and the Court of Appeals was not considering, the merits of the Bankruptcy Court's order vacating its prior abstention order.

ii. ***In re Fieldwood Energy, LLC*, 93 F.4th 817 (5th Cir. 2024)**

Issue: Whether appeal of confirmation order was moot.

Holding: The District Court denied the appellant's challenge to the Bankruptcy Court's confirmation order, which stripped the appellants of their subrogation rights (as sureties) against the debtor and allowed a sale of the debtor's assets to proceed. The District Court determined that the appeal was statutorily moot under Code § 363(m) and equitably moot under Fifth Circuit case law. The Fifth Circuit affirmed that the appeal was statutorily moot. Section 363(m) provides that "[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal." The Court clarified that although the Supreme Court's decision in *MOAC Mall*, 598 U.S. at 292, 143 S.Ct. 927 (2023), settled that Code § 363(m) is nonjurisdictional (and therefore subject to excuses like waiver and forfeiture), there were no issues of waiver and forfeiture with respect to appellees' assertion of § 363(m). The Court further explained that merely seeking a stay is not sufficient to overcome § 363(m)'s plain language that the authorization of a sale must actually be stayed pending appeal. Finally, the Court found that there was sufficient evidence in the record to support the District Court's finding that the provisions of the confirmation order stripping appellant's subrogation right were integral to the sale because of the Bankruptcy Court's finding that the sale was unlikely to close if the confirmation order was altered.

V. JURISDICTION

i. ***In re Virginia Park 1, LLC*, 672 B.R. 569 (Bankr. S.D.N.Y. 2025)**

Issue: Whether venue of Chapter 11 case should be transferred

Holding: Change-of-venue statute grants courts discretionary power to transfer a case to another district (or bankruptcy) court if the court finds that the transfer would be in the interest of justice or for the convenience of the parties. Under broad and flexible standard of interest-of-justice prong of test for transfer of bankruptcy case, the court considered whether (1) transfer would promote the economic and efficient administration of the bankruptcy estate, (2) the interests of judicial economy would be served by the transfer, (3) the parties would be able to receive a fair trial in each of the possible venues, (4) either forum has an interest in having the controversy decided within its borders, (5) the enforceability of any judgment would be affected by the transfer, and (6) the plaintiff's original choice of forum should be disturbed. The convenience-of-parties prong of test for transfer of venue of bankruptcy case has six factors: (1) proximity of creditors of every kind to court, (2) proximity of debtor, (3) proximity of witnesses necessary to administration of estate, (4) location of assets, (5) economic administration of estate, and (6) necessity for ancillary administration if liquidation should result. Also, a corporation's principal place of business, for venue purposes in a bankruptcy case, refers to the place where corporation's officers direct, control, and coordinate its activities. In this case, the principal place of business for one of three related Chapter 11 debtors, limited liability companies (LLC) incorporated in Michigan and involved in real estate rehabilitation projects in Detroit, was not New York. Even if debtor's books and records were held in New York office, debtor had not obtained the certificate of authority from the New York State Department of State required for a foreign corporation to conduct business in the state, it was unclear what work employees in the New York office did for any of the debtors and whether the debtors themselves, as opposed to an affiliated entity, actually employed any of those employees, and although New York-based individual controlled one of debtor's two managers, debtor had another manager, namely, another LLC that was controlled by a second individual, and there was no indication that either that LLC or individual was based in New York. Even assuming arguendo that principal place of business of one of three related Chapter 11 debtors, limited liability companies (LLC) incorporated in Michigan, was New York, and that remaining two debtors could both file in New York as related cases, transfer of the jointly administered cases from New York to Michigan "in the interest of justice" was still warranted for the following reasons: (i) the main assets of debtors, each of which had filed as "single asset real estate" entity, were tracts of Michigan real estate, (ii) each debtor's purpose was development of property in Detroit, (iii) judicial economy favored transfer, as bankruptcy cases were at early stage, (iv) relevant contracts were governed by Michigan law, and (v) there was pending litigation against debtors in Michigan state court. Finding that the debtors' operations affected exclusively Michigan, giving it a stronger interest than New York in resolution of cases, and given debtors' slim-at-best connection to New York, Bankruptcy Court declined to defer to the debtor's choice of forum. Moreover, regarding the convenience of the parties, (i) there was large number of unique, non-insider, and non-New York creditors, many of which were in Michigan, (ii) not all of the three shareholders implicated were New York-based, (iii) one debtor had no connection to New York, (iv) it would not inconvenience remaining two debtors to go to Michigan court even if their principal places of business were in New York, (v)

debtors' assets were entirely in Michigan, and (vi) most in a long list of potential witnesses were closer to Michigan court.

ii. ***In re Professional Fee Matters Concerning the Jackson Walker Law Firm*, 671 B.R. 53 (S.D. Tex. 2025)**

Issue: Whether reference of bankruptcy proceeding should be withdrawn.

Holding: District courts consider the "general principles" described in *Holland America Ins. Co. v. Succession of Roy*, 777 F.2d 992, when determining whether "cause" exists for permissive withdrawal of the reference to the bankruptcy court, including whether the matter is "core" or "non-core," the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of debtors' and creditors' resources, and expediting the bankruptcy process, and whether there is a jury demand. The United States Trustee (UST), who had moved for relief from fee orders in 34 bankruptcy proceedings following discovery of then-bankruptcy judge's undisclosed relationship with attorney who was partner at law firm whose employment and fees had been approved in cases over which judge presided. The *Holland* factors, including the fact that the numerous significant issues surrounding the judge-attorney relationship and firm's knowledge thereof did not concern substantive bankruptcy rights or questions that could only arise in a bankruptcy case, as well as uniformity, economy, and expediency, favored withdrawal, as did consideration of other relevant principles, including concerns about the appearance of bias and the need to reestablish public trust and confidence in the court system in this "unique" and "highly unusual" case. The Holland factors are not exhaustive. The appearance of bias is sufficient to provide "cause" to appropriately adapt judicial assignment processes to cure such concerns. "Considering the facts that gave rise to these proceedings, and the Court's desire to promote uniformity, economy, and expediency, this Court finds the references to the bankruptcy courts should be terminated."

iii. ***In re SVB Financial Group*, 2024 WL 1753566 (Bankr. S.D.N.Y. 2025)**

Issue: Whether Bankruptcy Court has post-confirmation jurisdiction over adversary proceeding.

Holding: To establish post-confirmation jurisdiction in Chapter 11 case, party invoking bankruptcy court's jurisdiction must satisfy two requirements: first, matter requires close nexus to bankruptcy plan or proceeding, as when matter affects interpretation, implementation, consummation, execution, or administration of confirmed plan, and second, Chapter 11 plan must provide for retention of jurisdiction over the dispute. In this case, Bankruptcy Court had nonexclusive post-confirmation jurisdiction over adversary proceeding against Chapter 11 debtor, the parent company of a commercial bank, and debtor's successor-in-interest, in which buyer that had acquired substantially all assets of bridge bank to which Federal Deposit Insurance Corporation (FDIC), as receiver, had transferred commercial bank's assets sought declaration that buyer owned or had exclusive license to use debtor's intellectual property (IP) assets. The debtor's plan had been confirmed and the estate destroyed as of plan's effective date, plan had assigned every relevant asset, including causes of action or defenses against buyer, to debtor's successor, so there was no more relevant estate property over which Court could exercise exclusive in rem jurisdiction, and no plan provision gave Court exclusive jurisdiction over any cause of action or over the IP dispute, but

merely provided that Court would retain jurisdiction over various other matters. Nevertheless, abstention was warranted under the Declaratory Judgment Act (DJA), in adversary proceeding brought against Chapter 11 debtor, seeking declaration that buyer owned or had exclusive license to use debtor's intellectual property (IP) assets. Adversary proceeding was duplicative of successor's pending trademark infringement litigation against buyer in federal court in California and so would not serve a useful purpose in clarifying or settling the legal issues raised, as California court was perfectly capable of so doing, current proceeding appeared to be a race to res judicata, and so the "better" and "more effective" remedy appeared to be permitting the litigation to proceed in California.

iv. ***In re Celsius Network, LLC*, 670 B. R. 379 (S.D.N.Y. 2025)**

Issue: Whether adversary proceeding asserting claims for securities fraud should be heard by the District Court

Holding: Mandatory withdrawal of the reference was warranted with respect to claim of federal securities fraud asserted in adversary proceeding brought by litigation administrator for Chapter 11 debtor, a cryptocurrency platform, and its affiliated debtors against, inter alia, developer of software protocol system and developer's co-founders. To resolve claim, the Court would need to resolve threshold question of whether digital tokens distributed through protocol constituted "securities" within meaning of the Securities Act, a matter that plainly fell outside the Bankruptcy Code's scope. At the very least the case would require novel application of Supreme Court's *Howey* analysis and federal securities laws to virtual and digital assets in a relatively nascent and evolving field of law, without the benefit of any guidance from the Court of Appeals, and all cases relied upon by administrator had been decided by Article III courts.

Permissive withdrawal of the reference was warranted as to claims of negligence, negligent misrepresentation, professional malpractice, and breach of fiduciary duty. Under *Stern*, Bankruptcy Court lacked final adjudicative authority over claims, as they did not implicate public rights, defendants had not filed proof of claim in underlying bankruptcy case, and defendants had not consented to Bankruptcy Court's entry of final judgment, claims arose from prepetition conduct and in no way turned on bankruptcy law or depended on federal bankruptcy jurisdiction, so adversary proceeding was non-core, and remaining *Orion* factors, 4 F.3d 1095, namely, judicial efficiency, uniformity, jury-trial rights, and forum shopping, either favored or did not weigh against withdrawal.

v. ***In the Matter of Highland Capital Management, L.P.*, 98 F.4th 170 (5th Cir. 2024)**

Issue: Whether Bankruptcy Court had jurisdiction to issue sanctions.

Holding: The Fifth Circuit vacated and remanded a lower court's decision for further consideration because the Bankruptcy Court's imposition of a sanction went beyond the court's ability to impose civil contempt sanctions. The dispute arose from a Bankruptcy Court order that required the court's approval before any party pursued any action against one of the Debtor's officers. Despite this order, an entity controlled by another party filed suit, without approval, in District Court against Debtor and sought to add the officer as a defendant. Though the suit was dismissed by the District

Court for procedural issues, the Debtor moved the Bankruptcy Court to address apparent violation of its order. The Bankruptcy Court granted the motion and allowed extensive discovery to consider explanations and rationales for those involved in filing the lawsuit. Ultimately, the Bankruptcy Court determined that the suit violated its order and ordered the filers and their law firm to pay the Debtor for the costs incurred in litigating the contempt proceedings. The District Court largely affirmed the Bankruptcy Court's ruling, except that it struck down a $100,000 per-appeal sanction. The Fifth Circuit reversed, finding that the Bankruptcy Court exceeded its civil contempt powers. In essence, the Bankruptcy Court failed to establish a causal link between the filers' misbehavior and the sanction amount. The Court found that the Debtor incurred almost all of its contempt-related costs because the Bankruptcy Court allowed extensive discovery and a lengthy hearing on the filers' motives. The Court found this unnecessary because the only question in civil contempt is the extent to which Debtor was damaged by the filers' decision to file the suit in District Court rather than Bankruptcy Court. Thus, the proper sanction amount should only consider the expenses that the Debtor incurred in opposing the suit in District Court compared to if the suit had been filed in Bankruptcy Court.

vi. ***Bush v. United States*, 100 F.4th 807 (7th Cir. 2024)**

Issue: Whether Bankruptcy Court had jurisdiction to determine tax penalties.

Holding: The Seventh Circuit issued an amended opinion after rehearing on whether the Bankruptcy Court had jurisdiction to determine the amount of the penalties that the debtors owed to the IRS as a result of past due taxes. The parties focused their dispute on whether Code § 505(a)(1)'s grant of authority to the Bankruptcy Court to determine the amount of any penalty related to a tax also conferred subject matter jurisdiction to the Bankruptcy Court. The Seventh Circuit clarified that Code § 505(a)(1) is not jurisdictional and instead turned to 28 U.S.C. § 1334 as the relevant statute for assessing the Bankruptcy Court's jurisdiction. Section 1334 provides the Bankruptcy Court jurisdiction for disputes "arising in" bankruptcy litigation, "arising under" the Bankruptcy Code, or "related to" the resolution of the bankruptcy proceeding. The tax penalty dispute did not "arise in" the bankruptcy case because it is not an issue exclusive to bankruptcy. The tax penalty dispute did not "arise under" the Bankruptcy Code because the substance of the dispute turned on analysis of the Internal Revenue Code. However, the Seventh Circuit found that the tax penalty dispute could be "related" to the bankruptcy case. Rather than looking to the fact that, in this particular case, the determination of the tax dispute would not affect the allocation among creditors (being the *ex post* analysis the United States pushed for), the Seventh Circuit clarified that the proper analysis for a jurisdictional question is to examine *ex ante* whether the outcome of the dispute could potentially have an impact on other creditors. The Seventh Circuit remanded for further proceedings in line with this analysis and also noted that the District Court should further determine whether, even if related-to jurisdiction is satisfied, the District Court should abstain in favor of the tax court given the stage of the case and the tax dispute appearing to be one of the last matters to be resolved in the bankruptcy case.

vii. ***In re U.S.A. Dawgs, Inc.*, 657 B.R. 98 (9th Cir. BAP 2024)**

Issue: Whether Bankruptcy Court had jurisdiction over payment of legal fees.

Holding: The Ninth Circuit BAP affirmed the Bankruptcy Court's rejection of Debtor's affiliate's 60(b) motion of relief of judgment because (1) the Bankruptcy Court had subject matter jurisdiction over a dispute between Debtor's affiliate and Debtor's counsel over payment of legal fees, and (2) that Debtor's affiliate's due process rights were not violated when it was held liable for payment of the fees. Debtor's affiliate, Double Diamond, and Debtor agreed to be held jointly and severally liable to pay Debtor's bankruptcy counsel's fees in the event Debtor could not meet those obligations. All three parties enshrined this agreement in an Engagement Agreement, which the Bankruptcy Court approved. After the bankruptcy, Double Diamond and Debtor's counsel litigated Double Diamond's attempts to avoid paying the fees. Once Double Diamond lost those proceedings, it petitioned the Bankruptcy Court, under Rule 60(b) of the Federal Rules of Bankruptcy Procedure, for a relief from the judgment because the Bankruptcy Court lacked subject matter jurisdiction over the issue and because the proceeding violated Double Diamond's due process rights. On appeal, the BAP agreed with the Bankruptcy Court. The BAP found that the Bankruptcy Court had "arising under", "arising in", and "related to" jurisdiction under 28 U.S.C. § 1334(b). The court had "arising under" jurisdiction because the laws governing the Engagement Agreement were specific to the Bankruptcy Code. These laws set the standard for approving the Engagement Agreement, and approval of the fee arrangement contained in the Engagement Agreement. The court had "arising in" jurisdiction because the Engagement Agreement came about because of the bankruptcy rules' strict mandate for Chapter 11 counsel. Further, given Debtor's dire financial situation, the bankruptcy could not have happened without Double Diamond's agreement to fund Chapter 11 counsel. Finally, the court had "related to" jurisdiction because, though Double Diamond was not a creditor, Double Diamond's breach of the Engagement Agreement would have increased the estate's administrative expenses and thereby affecting Debtor in such a way to impact the administration of the estate. Finally, the Court affirmed that Double Diamond's due process rights were not violated because it was served all the proper documents and had an opportunity to challenge them but chose not to.

RECENT DEVELOPMENTS IN SUBCHAPTER V CASES

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It has been over four years since Subchapter V of Chapter 11 went into effect and it has proven to be effective and timely revision to Chapter 11, providing small businesses an opportunity to reorganize in these very difficult times. Its impact was aided by the CARES Act of 2020 that increased the aggregate secured and unsecured debt limit from $2,725,625[1] to $7,500,000 effective March 27, 2020, and extended to June 21, 2024. This increase has not been extended, however, and thus the debt limit is the same for Small Business Debtors as defined under Code § 101(51D), which as of April 1, 2022 was adjusted up to $3,024,725.

According to statistical information total US Bankruptcy filings surged by 18% in 2023 and Chapter 11 cases increased by 72%. Over sixty percent of the Chapter 11 cases with business debts were Subchapter V cases. Based on statistics provided by the U.S. Courts through the end of 2023, Subchapter V cases have had approximately double the percentage of confirmed plans and half the percentage of dismissals in comparison to other non-subchapter V small business cases. Also, during 2020-2023, the median months to confirmation of Subchapter V plans has been approximately 6 months as compared to approximately 10 months for non-subchapter V small business cases and nearly 70% of the confirmed Subchapter V plans have been consensual plans.

A. LEGISLATION

1. *Small Business Reorganization Act of 2019*, Pub. L. 116-54, 133 Stat. 1079 (Aug. 23, 2019) (effective February 19, 2020).

2. *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020*, Pub. L. No. 116-136, 134 Stat. 281 (effective March 27, 2020) (increased the debt limits for a Subchapter V debtor to $7,500,000 until March 27, 2022 as extended by COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5 (Mar. 27, 2021).

3. *Consolidated Appropriations Act,* Pub. L. 116-260 (effective Dec. 27, 2020)(added (i) subsections (B) and (C) to Code § 365(d)(3) to allow courts to temporarily extend the time for performance of lease obligations for Subchapter V debtors relating to unexpired nonresidential real property leases to 120 days, provided the debtor is experiencing material financial hardship due to COVID-19, and (ii) amended Code § 365(d)(4) to extend the initial deadline for any debtor to assume or reject an unexpired lease of nonresidential real property by an additional ninety days to a total of 210 days after the petition date (potentially 300 days total). These temporary provisions expired

4. *Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L.* 117-151 (June 21, 2022)(Amends Code § 1182(1) to reset debt limit for Subchapter V at $7,500,000 to be made retroactive to cases filed after March 27, 2020; Amends Code § 109(e) to combine secured and unsecured debt in Chapter 13 cases to $2,750,000; both to sunset in two years after enactment.). According to the sunset provisions of the statute, for the

[1] 11 U.S.C. §101(51D).

purposes of Subchapter V in cases filed after June 21, 2024, the "term 'debtor' means a small business debtor as defined in Code § 101(51D).

B. APPLICATION TO PENDING CASES

1. *In re Seven Stars on Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020)

Issue: Can a debtor in a pending Chapter 11 case amend its petition to make a Subchapter V election?

Holding: Bankr. Rule 1009 does not prevent debtor from amending its petition to elect Subchapter V, but in this case the deadlines for holding a status conference and filing a plan had passed and Code §§ 1188(b) and 1189(b) do not allow extensions unless the need is attributed to circumstances for which the debtor is not "justly accountable." This standard is higher than "cause" and in this case the delay was within the debtor's control.

Accord In re Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742 (Bankr. M.D. Fla. 2020)(debtor's election is too late to file a plan); *In re Double H Transportation*, 614 B.R. 552 (Bankr. W.D. Tex. 2020); *In re Body Transit*, 613 B.R. 400 (Bankr. E.D. Pa. 2020)(debtor could file plan within deadline).

Contra In re Easter, 2020 WL 6009201 (Bankr. N.D. Miss. 2020) ("Debtor's inability to meet the deadlines imposed under SBRA . . .constitutes circumstances for which they should not be held accountable"); *In re Blanchard,* 2020 WL 4032411 (Bankr. E.D. La. 2020)("there are no bases in law or rules to prohibit a resetting or rescheduling of these procedural matters" quoting *Progressive Solutions); In re Bonert*, 619 B.R. 248 (Bankr. C.D. Calif. 2020)(no prejudice to creditors to allow election); *In re Trepetin*, 617 B.R. 814 (Bankr. Md. 2020)(debtor could extend deadlines because new statute was beyond the debtor's control); *In re Progressive Solutions*, 615 B.R. 894 (Bankr. C.D. Calif. 2020)(new statute applied to pending cases); *In re Twin Pines*, LLC, 2020 WL 5576957 (Bankr. N.M. 2020); *In re Deidre Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020); *In re Bello*, 613 B.R. 894 (Bankr. E.D. Mich. 2020)(ok to amend after plan deadline).

C. ELIGIBILITY

1. *In re Amerinvest, LLC*, 670 B.R. 40 (Bankr. E.D. Vir. 2025)

Issue: Whether the Debtor was a single asset real estate entity.

Holding: While multiple parcels with both commercial and residential leasing operations could constitute "single project," so as to constitute "single asset real estate," the properties would need to be linked by or part of a unified purpose or plan, such as a large land development project. The fact that Subchapter V Chapter 11 debtor had no plans to combine its three adjacent parcels of real estate into one legal unit did not negate fact that the parcels were treated as one economic unit in debtor's common plan to operate as a commercial landlord for the parcels, for purposes of determining that the parcels constituted a "single project," so that debtor could qualify as a single

asset real estate (SARE) entity. The location and proximity of three adjacent parcels of real estate owned by the debtor supported finding that the parcels constituted a "single project," so that the debtor could qualify as a single asset real estate entity. While debtor asserted that there was a fence segregating one lot from the other two parcels, the reality was that the parcels were adjacent to one another in the configuration of a small strip shopping center with a fenced lot connected to shared parking lot, and there were very few parking spaces on the lot, such that when fully occupied by lessee for restaurant, as debtor planned, tenants of parcel would be almost wholly dependent on the lot to provide parking for their customers.

2. *In re Hub City Home Health, Inc.*, 667 B.R. 822 (Bankr. S.D. Tex. 2025)

Issue: Whether priority unsecured wage claims should be included in calculating debt limit for eligibility

Holding: Code § 101(51D) unambiguously required priority unsecured wage claims to be included in category of unsecured debts when calculating the debt limit for eligibility as small business debtors under Subchapter V of Chapter 11. In this case, the debtors' aggregate noncontingent liquidated secured and unsecured debts, including priority wage claims, as of the date of the filing of the petitions in the combined amount of $3,405,699 exceeded the statutory debt limit of $3,024,725, and therefore the debtors were not eligible as small business debtors and could not proceed under Subchapter V of Chapter 11.

3. *In re Stevens*, 667 B.R. 428 (Bankr. S.D. W. Vir. 2025)

Issue: Whether debtor was eligible for Subchapter V

Holding: Under totality of the circumstances, debtors were engaged in "commercial or business activities" on petition date as required to qualify for relief under Subchapter V of Chapter 11, through the rental of real property through their company, liquidation of a business asset postpetition, which was a wind-down business activity, and engagement in discussions, negotiations, and other efforts to restructure and repay indebtedness under personal guarantees of commercial business debt.

4. *In re Ellingsworth Residential Community Assoc*, 125 F.4th 1365 (11th Cir.)

Issue: Whether non-profit entity is eligible for Subchapter V.

Holding: Non-profit community association was a commercial business activity even though it does not make a profit. "No profit motive is required."

5. *In re Village Oaks Senior Care, LLC*, 664 B.R. 170 (Banrk. E.D. Calif. 2024)

Issue: Whether debtor was eligible for Subchapter V case.

Holding: Even though secured creditor's participation in debtors' three separate but related bankruptcy cases had been extensive and substantive, altering the trajectory of the cases, the Bankruptcy Court would decline to apply the doctrine of waiver and thereby preclude creditor from objecting to debtors' eligibility for relief under Subchapter V Chapter 11, in order to avoid inequitable results, where debtors were unable to explain why known debt was not accurately and truthfully scheduled and it was apparent that debtors knew their aggregated debts exceeded the $7,500,000 Subchapter V debt cap, and so in an effort to manufacture Subchapter V eligibility, or to at least make it more likely, the debtors manipulated debt in their schedules to bring aggregated debts below $7,500,000.

6. *In re Bradford*, 663 B.R. 831 (Bankr. D. Utah 2024)

Issue: Whether debtor was eligible for Subchapter V case.

Holding: Plain reading of phrase "engaged in," in context of Bankruptcy Code provision requiring that debtor be a person engaged in commercial or business activities to be eligible to proceed under Subchapter V of Chapter 11, requires debtor to be or actively and currently involved in the commercial or business activities on the date it filed its bankruptcy petition. To determine whether debtor was engaged in commercial or business activities, as required for it to be eligible for relief under Subchapter V of Chapter 11, courts apply "totality of the circumstances" test, which requires looking at all the facts and circumstances of the debtor's particular situation and what activities the debtor was engaged in as of the petition date. In this case, the debtor, a retired anesthesiologist whose primary income was social security and who volunteered his time and efforts to a family enterprise in which he had no interest, was not a person engaged in commercial or business activities and therefore could not proceed under Subchapter V of Chapter 11. The debtor's expenses were personal in nature and not tied to a business, none of debtor's personal debts involved family enterprise, and debtor did not trade in commodities and he had no occupation or employment habitually engaged in for livelihood or gain.

7. *In re Burdock and Associates, Inc.*, 662 B.R. 16 (Bankr. M.D. Fla. 2024)

Issue: Whether debtor was eligible for Subchapter V case.

Holding: Creditor's claim in contractual dispute, including for lost profits, was unliquidated for purposes of determining corporate debtor's eligibility for relief under Subchapter V of Chapter 11, where consulting agreement between creditor and debtor included no financial terms, not even the rate charged by debtor for its consulting services, and nothing in the agreement that would allow one to calculate a claim for breach or alert debtor of the magnitude of such claim, creditor's contracts with third parties could not be used to easily calculate damages, as those contracts were not at issue nor were they referenced in the consulting agreement, and lost profits were not capable of simple calculation or computation, but instead, required the exercise of judgment or discretion. Thus debtor was eligible for Subchapter V case because the objecting creditor's claim was unliquidated and thus objection to plan was denied.

8. *In re Karben4 Brewing, LLC*, 661 B.R. 392 (Bankr. W.D. Wis., 2024).

Issue: Whether debtor's noncontingent liquidated debts exceeded the debt limit for Subchapter V.

Holding: Managers of Chapter 11 debtor, a limited liability company formed as a craft brewery, were not authorized to file its Subchapter V petition absent consent of members, requiring dismissal of case. Under Wisconsin law, debtor's operating agreement, which gave managers authority over tasks described as "ordinary course," routine, and day-to-day, was ambiguous and would be interpreted so as to render it a rational business instrument. A reasonable person would have understood scope of managers' authority as limited to "ordinary course" activities, such "ordinary course" activities of entity that manufactured and sold beer included obtaining credit, replacing equipment, executing leases, arranging for distribution, and other normal industry practices, not filing for bankruptcy, which was not a routine or customary business practice and thus was beyond debtor's "ordinary course" operations, and state statutes did not expressly vest authority to file bankruptcy in managers.

9. *In re Zhang Medical P.C.*, 655 B.R. 403 (Bankr. S.D.N.Y. 2023)

Issue: Whether debtor's noncontingent liquidated debts exceeded the debt limit for Subchapter V.

Holding: In assessing a debtor's eligibility for subchapter V of Chapter 11, bankruptcy court may look both to debtor's schedules and to creditors' proofs of claim in determining debtor's total noncontingent liquidated debt. In this case, the noncontingent liquidated debts scheduled by debtor, which operated a Manhattan fertility clinic with a large international clientele, or reflected in proofs of claim as of petition date substantially exceeded statutory $7.5 million debt limit for Subchapter V debtors. Although debtor scheduled $5,797,128 in noncontingent liquidated debts, 27 scheduled creditors asserted proofs of claims in amounts larger than scheduled amounts. If those higher values were counted, resulting total would be $10,468,441 in noncontingent liquidated debts. Debtor challenged only one claim, namely, portion of landlord's claim triggered by filing of mechanic's lien. If the challenged sum of $1,338,757 were deducted from $10,468,441 total, resulting amount of noncontingent liquidated debt, $9,129,684, would exceed debt limit, and Bankruptcy Court's review of landlord's claim confirmed that four of its five components, that is, all but portion challenged by debtor, should be counted toward debt limit. Landlord's claim for unpaid rent was properly counted in determining whether noncontingent liquidated debts scheduled by debtor or reflected in proofs of claim as of the petition date exceeded the statutory $7.5 million debt limit for subchapter V Chapter 11 debtors. The claim was "noncontingent," since it was triggered by prepetition events, and it was "liquidated," since amount of rent was specified in parties' lease and the unpaid amount was easily calculable. Debtor's future payment obligations under its executory contracts and unexpired leases should rarely, if ever, be included in the debt-limit calculation; until debtor elects either to assume or to reject a contract or lease. In contrast to an executory contract that is assumed by a debtor, which is an estate asset, a rejected contract is generally a pure liability to the estate, with no offsetting benefits; consequently, the debtor's rejection damages liability can fairly be considered a "debt" as the Bankruptcy Code defines that term.

10. *In re Fama*, 2023 WL 6131466 (Bankr. E.D.N.Y., Sept. 15, 2023)

Issue: Whether debtor's designation as Subchapter V should be allowed.

Holding: In order to be eligible to proceed under Subchapter V of Chapter 11, a debtor must be presently engaged in commercial or business activities. Requirement for eligibility to proceed under Subchapter V of Chapter 11 that debtor is "engaged in commercial or business activities" is a broad, encompassing phrase reflecting Congress' intent to provide wide availability for debtors to elect to file under Subchapter V and should be construed inclusively, to encompass any act of a business of a commercial nature under the totality of the circumstances. The debtor's need not be continuing its usual or prior business operations in order for it to be "engaged in business or commercial activities" as required for eligibility to proceed under Subchapter V of Chapter 11; that is, the terms "activities" and "operations" are not interchangeable, as "operations" insinuates a fully functioning business, but "activities" encompasses acts that are business or commercial in nature but fall short of an actual operating business. In this case, Debtor was "engaged in commercial or business activities," as required for eligibility to proceed under Subchapter V of Chapter 11, even though construction and contracting business that debtor had 25 percent interest in and that was the source of debt at issue, namely, personal guarantees of business debt, was not conducting its historical business operation as of petition date, and where debtor was addressing residual business debt in his bankruptcy case, debtor was pursuing a multi-million dollar counterclaim against former business associates for allegedly taking excessive distributions from business, and the court finds that the bankruptcy case was not motivated by gamesmanship.

11. *In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Vir. 2023)

Issue: Whether damages from rejection of commercial lease was noncontingent and liquidated for the purposes of Subchapter V eligibility.

Holding: Liability of $14,390,820 under corporate debtor's leases of commercial office space was noncontingent and liquidated, for purposes of assessing debtor's eligibility for relief under Subchapter V of Chapter 11 as small business debtor because the lease liability arose prepetition, on dates the leases were fully executed, and timing of payments was not based on a future extrinsic event that might never occur.

12. *In re Evergreen Site Holdings, Inc.*, 652 B.R. 307 (Bankr. S.D. Ohio 2023)

Issue: Whether debtor's ownership of real property made it ineligible to proceed under Subchapter V.

Holding: In order for Chapter 11 debtor to be considered a "single asset real estate debtor," and thus ineligible for relief under Subchapter V of Chapter 11, three requirements must all be met: (1) debtor must have real property comprising a single property or a single project, other than a residential real property with fewer than four residential units, (2) the single property or project must generate substantially all of the debtor's gross income, and (3) there must be no substantial business conducted on the property other than the business of operating the real property and activities incidental thereto; all three requirements must be met for debtor to be deemed a "single

asset real estate debtor." In this case, corporate debtor met the burden of proving by a preponderance of the evidence that its two parcels did not comprise a "single project" because the debtor's two parcels were not being used together in a common scheme. A small mobile home park was situated on one parcel, and the other parcel consisted of vacant land and was not presently being used at all.

13. *In re Free Speech Systems, LLC*, 649 B.R. 729 (Bankr. S.D. Tex. 2023)

Issue: Whether bankruptcy court could revoke Subchapter V election.

Holding: Bankruptcy Court had constitutional authority to enter a final judgment in proceeding whereby creditors sought to revoke Chapter 11 debtor limited liability company's (LLC) Subchapter V election, after debtor's owner had filed a separate Chapter 11 case. However, the decision to proceed under Subchapter V of Chapter 11 is within the exclusive province of the debtor and even if Bankruptcy Court could revoke Chapter 11 debtor limited liability company's (LLC) Subchapter V election, the court would not do so on creditors' motion after debtor's owner had filed a separate Chapter 11 case, because debtor, its owner, and creditors were currently engaged in mediation, debtor had already filed a Subchapter V plan; and several nondischargeability adversary proceedings had started against debtor.

14. *In re Hall*, 650 B.R. 595 (Bankr. M.D. Fla. 2023)

Issue: Whether loans to debtor and owner were liquidated.

Holding: Dispute between purported debtors and purported creditor, in adversary proceeding by purported debtors seeking disallowance of purported creditor's claim, relating to loans made to purported debtors, in its entirety based on fraud in the inducement, intentional misrepresentation, negligent misrepresentation, and equitable subordination, did not render the debt unliquidated, as would exclude amount of debt for purposes of calculating whether purported debtors exceeded $7.5 million debt limit for eligibility for relief under Subchapter V of Chapter 11, even if parties' dispute over claim was asserted by debtors to be "substantial."

15. *In re Quadruple D Trust*, 639 B.R. 204 (Bankr. D. Colo. 2022)

Issue: Whether spendthrift trust was eligible for Subchapter V.

Holding: Debtor was a spendthrift trust created under Colorado law and filed for Subchapter V of Chapter 11. The Court held that the debtor was not a "business trust" eligible for Subchapter V. The trust agreement stated that it was created as irrevocable trusts for the primary benefit of the family of settlor, and all the beneficiaries of the trust were family members, which suggested that the trust was a typical family trust, and beneficiaries did not put their capital at risk and trust agreement did not identify the beneficiaries' respective ownership interests in the trust, which suggested the impossibility of any transfer of interests. Additionally, the trust agreement expressly identified its purpose of this trust is to acquire and hold residential real property for the benefit of the beneficiaries, mentioning nothing about conducting any business activities.

16. *In re RS Air, LLC*, 638 B.R. 403 (9th Cir. BAP 2022)

Issue: Whether debtor was eligible for Subchapter V.

Holding: A limited liability company is a "person," for purposes of determining debtor's eligibility to proceed under Subchapter V of Chapter 11. Debtor need not be maintaining its core or historical operations on petition date to be eligible to proceed under Subchapter V of Chapter 11, but it must be presently engaged in some type of commercial or business activities. Profit motive was not required for debtor to be eligible to proceed under Subchapter V of Chapter 11.

17. *In re Ventura*, 638 B.R. 499 (E.D.N.Y. 2022)

Issue: Whether individual debtor should be allowed to amend her petition to proceed under Subchapter V.

Holding: Bankruptcy Court abused its discretion by overruling mortgagee's objection to motion by individual Chapter 11 debtor to amend her petition, designate herself as a Subchapter V debtor under the Small Business Reorganization Act, which had not been in effect on the petition date, and modify her mortgage. The belated amendment filed nearly 16 months after the case was commenced caused substantial prejudice to mortgagee, which had spent considerable resources to get to point at which it was poised to confirm its competing, unopposed plan and amendment ended mortgagee's right to pass any plan, thereby completely changing its rights as a creditor and resetting "litigation posture" of proceedings. Further the prejudice to debtor did not outweigh prejudice to mortgagee, since, if modification were denied, debtor's interests would still be protected by Chapter 11.

18. *In re Rickerson*, 636 B.R. 416 (Bankr. W.D. Pa. 2021)

Issue: Whether medical doctor who was a part time employee of a health care provider qualified for Subchapter V.

Holding: An employee of a business owned by someone else does not qualify the debtor to be a small business debtor under Code § 1182(1)(A). The debtor was a physician who owned a medical practice that had closed some years before the petition date.

19. *In re Vertical Mac Construction, LLC*, 2021 WL 3668037 (Bankr. M.D. Fla. July 23, 2021)

Issue: Whether debtor that was no longer operating was eligible to use Subchapter V to liquidate.

Holding: Debtor who had ceased operations in Oct. 2020 was eligible to file Subchapter V in April 2021 to liquidate its assets. At the filing date, the debtor maintained business bank accounts, had accounts receivable, worked with insurance adjusters and insurers to address prepetition insurance claims, and was preparing assets for sale. Subchapter V eligibility is limited to a "person engaged in commercial or business activities." "Commercial or business" means dealings or transaction of an economic nature. "Activities" requires behavior, actions, or acts. Under these

definitions, the debtor's conduct on the petition date included commercial or business activities and is therefore eligible for subchapter V. Operations are not required.

20. *In re Port Arthur Steam Energy, L.P.*, 2021 WL 277993 (Bankr. S.D. Tex., July 1, 2021)

Issue: Whether debtor that was no longer operating was eligible for Subchapter V.

Holding: The debtor was still "engaged in commercial or business activities" even though it was no longer involved in the business of producing and selling steam and electricity since it was actively pursuing litigation against a third party. Also, nothing prohibits a Subchapter V debtor from filing a liquidation plan.

21. *In re Blue*, 630 B.R. 179 (Bankr. M.D.N.C. 2021)

Issue: Whether debtor was eligible for Subchapter V.

Holding: Debtor that was no longer operating was "engaged in commercial or business activities" even though most of her debt was from a consulting company that she had owned and was no longer in business. The business debts do not have to be from the current business.

22. *In re Offer Space, LLC*, 629 B.R. 299 (Bankr. D. Utah 2021)

Issue: Whether debtor was engaged in commercial or business activities when primary asset had been sold.

Holding: Debtor's actions in winding down its business constitutes "commercial or business activities." *Accord, In re Ikalowych*, 2021 WL 1433241 (Bankr. D. Colo. Apr. 15, 2021) (Individual debtor's wind-down of pass through LLC that owned 30 percent of a different LLC was eligible for Subchapter V)

23. *In re Enkogs, LLC*, 626 B.R. 860 (Bankr. M.D. Fla. 2021)

Issue: Whether debtor, which operated a 79-room hotel, was a "single asset real estate" debtor and thus not qualified to file under Subchapter V.

Holding: The Debtor's hotel was not a "single asset real estate" because in connection with operating the hotel, the Debtor provided room cleaning and laundry services, internet/wi-fi services, phone, parking and business services, and complimentary breakfast and swimming and fitness center.

24. *In re McGrath*, 2021 WL 1784079 (Bankr. M.D. Fla. Mar. 16, 2021)

Issue: Whether debtors, whose primary activity was owning a three parcels of real property, were "single asset real estate" debtor and thus not qualified to file under Subchapter V.

Holding: The debtors were eligible because "single asset real estate" requires substantially all of the gross income of the debtor to be generated from that property, and in this case, there was no common plan regarding the three parcels and the rent generated by the commercial property had been previously seized by the lender and were not property of the estate.

25. *In re Thurmon*, 625 B.R. 417 (Bankr. W.D. Mo. 2020)

Issue: Whether debtors, whose business had closed prior to the petition date, were engaged in commercial or business activities.

Holding: Court held that "engaged in" is present tense and thus "if Congress had intended to make all debtors with business debts below the debt cap eligible for Subchapter V small business relief regardless of whether the business was still operating, it could have done so." Thus, the court sustained the UST's objection to the Debtors' Subchapter V election but overruled the UST's objection to confirmation of the Debtors' chapter 11 plan for failure to file a disclosure statement because the requirement to file a disclosure statement has either been waived or is not applicable under the unusual circumstances of this case. *Accord, In re Johnson*, 2021 WL 825156 (Bankr. N.D. Tex. Mar. 1, 2021) (defunct company went out of business over a year prior to filing and debtor was merely an officer of the company).

26. *In re Serendipity Labs, Inc.*, 620 B.R. 679 (Bankr. N.D. Ga. 2020)

Issue: Whether debtor was eligible under Subchapter V when more than 20% of debtor's voting stock was held by a company whose stock was publicly traded on stock exchange.

Holding: Subchapter V excludes from eligibility any debtor that "is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)." 11 U.S.C. § 1182(1)(B)(iii). Because Steelcase is an "issuer," Debtor is ineligible to proceed under Subchapter V if it is an affiliate of Steelcase. Code § 101(2)(A) defines "affiliate" as an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor." Steelcase owns more than 27% of Debtor's voting securities and is therefore an affiliate of Debtor.

27. *In re 305 Petroleum, Inc.*, 622 B.R. 209 (Bankr. N.D. Miss. Oct. 27, 2020)

Issue: Whether debtor must count debts of affiliate in whether debtor is eligible for Subchapter V when affiliate is a single asset real estate and will not be filing Subchapter V.

Holding: Code § 101(51D) requires the debts of "all its affiliates" to be included in the debt threshold, even if the affiliate will not be a Subchapter V debtor.

28. *In re Parking Management*, 620 B.R. 544 (Bankr. Md. 2020)

Issue: Whether debt amount includes rejection damages under lease and PPP loan.

Holding: Lease rejection damages in the amount of $1.7 million for the rejection of twelve parking lots should not be included in calculating the amount of debt for the purposes of eligibility for Subchapter V because the amount is determined as of the petition date and not the date of rejection. Also PPP loan claim for $1.8 million was an unliquidated claim.

29. *In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La. July 16, 2020)

Issue: Whether debtor must be currently engaged in commercial business activities to qualify as a Subchapter V debtor.

Holding: Under the statute for small business under Subchapter V, the debtor does not have to be currently engaged in commercial or business activities. *Accord In re Wright*, 2020 WL 2193240 (Bankr. D.S.C. 2020).

D. CONVERSION AND DISMISSAL

1. *In re Earthsnap, Inc.*, 760 B.R. 49 (Bankr. E.D. Tex. 2025)

Issue: Whether Subchapter V case should be converted to Chapter 7

Holding: When determining whether to dismiss or convert a Chapter 11 case for "cause," court is required to apply a burden shifting analysis, under which movant bears the initial burden to establish "cause" by a preponderance of the evidence; once movant shows "cause," the burden shifts to the debtor to establish statutory exception. In this case, Subchapter V Chapter 11 debtors failed to demonstrate "unusual circumstances" as might warrant the Bankruptcy Court declining to dismiss or convert case despite the existence of cause to do so. While the Court was sympathetic to debtors' counsel's challenges, debtors' reporting failures dated from the very beginning of the cases, debtors other failures were not cured prior to hearing on creditors' motion to convert or dismiss case despite ample time to do so. Also, debtors' plan proposed prior to the hearing did not meet the requirements for confirmation, even after debtors were permitted an extension of time in which to file a plan, debtors' failures were not unique, and it was far from clear that creditors' outcome would be any better were these cases to continue under Chapter 11. Further, conversion of debtors' jointly administered Subchapter V Chapter 11 cases to Chapter 7, rather than dismissal, was in the best interests of creditors and the estates, where debtors previously filed Chapter 11 in another jurisdiction but those prior cases did not result in successful confirmation of reorganization plans benefiting creditors, and it was entirely plausible that debtors would, if the current cases were dismissed, repeat the bankruptcy process a third time in yet another jurisdiction.

2. *In re Ghatanfard*, 2024 WL 4707931 (S.D.N.Y. Nov. 7, 2024)

Issue: Whether Subchapter V case should be converted or dismissed because of conflict of interest of the debtor.

Holding: Subchapter V Chapter 11 debtor's conflict of interest constituted cause to convert case to Chapter 7, where debtor apparently transferred substantial assets to his life partner during

underlying litigation, and debtor was not going to vigorously pursue claims that what he and his partner did was fraudulent or otherwise voidable in bankruptcy, thus allowing him to control the extent to which return of those assets for the benefit of his creditors would be sought. Once "cause" is established to dismiss or convert a Chapter 11 case, it is the debtor's burden to demonstrate by evidence the unusual circumstances that establish that dismissal or conversion is not in the best interests of creditors and the estate. While the Code § 1112(b)(2) does not define "unusual circumstances" establishing that conversion or dismissal of Chapter 11 case is not in the best interests of the creditors and the estate, courts have determined that it contemplates conditions that are not common in most Chapter 11 cases. Such conditions must not only be unusual, they must also demonstrate that dismissal or conversion is not in the best interest of creditors and the estate. In this case, the debtor failed to establish unusual circumstances establishing that conversion or dismissal was not in the best interests of the creditors and the estate for the following reasons: (i) while debtor asserted that he had serious health issues and Subchapter V trustee had been appointed, he failed to explain why those factors were unusual and warranted exceptions, and (ii) to the contrary, the situation was sufficiently serious that it required a trustee with the power not only to investigate but to take action to address the transfers.

3. *In re The Turkey Leg Hut & Co. LLC*, 665 B.R. 129 (Bankr. S.D. Tex., 2024)

Issue: Whether US Trustee's motion to convert or dismiss should be granted**.**

Holding: Court must consider the totality of the circumstances when determining "cause" to convert or dismiss Chapter 11 case. When determining whether to dismiss or convert Chapter 11 case for "cause," court is required to apply burden shifting analysis, under which moving party bears initial burden to establish "cause" by preponderance of evidence; once the movant shows "cause," the burden shifts to debtor to establish statutory exceptions. If movant demonstrates that there is cause for conversion or dismissal of Chapter 11 case, then conversion or dismissal is mandatory, unless court determines appointment of Chapter 11 trustee or examiner is in best interests of creditors and estate. Appointment of a trustee or examiner is not an available option in Subchapter V Chapter 11 cases. Debtor may escape dismissal or conversion of Chapter 11 case if they satisfy two prongs: first, debtor must specifically identify unusual circumstances establishing that converting or dismissing case is not in best interests of creditors and estate, and debtor must prove that the grounds for converting or dismissing case include act or omission of debtor, other than substantial or continuing loss to or diminution of estate and absence of reasonable likelihood of rehabilitation, for which there exists reasonable justification for the act or omission, and that will be cured within reasonable period of time.

In this case, Subchapter V Chapter 11 debtor's gross mismanagement of the estate, including (i) Subchapter V Chapter 11 debtor's failure to maintain appropriate insurance, (ii) debtor's failure to timely file accurate statement of financial affairs (SOFA) and monthly operating statements (MOR), (iii) unexcused repeated failures to appear at initial debtor interviews scheduled by United States Trustee, (iv) Debtor's failure to timely provide information reasonably requested by the United States, (v) Debtor's failure to comply with court order, when it failed to file post-petition tax returns, deposit $83,000 into its counsel's "Interest on Lawyers' Trust Account" (IOLTA), and appear at meeting of creditors. In deciding, after a showing of the requisite "cause," whether dismissal or conversion of Chapter 11 case is in best interest of creditors and estate, court may

consider the preferences expressed by parties in interest, especially neutral third-parties such as United States Trustee, when there are no estate assets with equity in the estate. Therefore the motion to convert is granted.

4. *In re Lashley*, 664 B.R. 408 (Bankr. W.D. Ky, 2024)

Issue: Whether SubChapter V case should be dismissed or converted to Chapter 7

Holding: Debtor's inability to accomplish substantive progress toward confirmation of proposed Chapter 11 plan inherently carries the risk of unreasonable and undue delay, which is nearly always prejudicial toward creditors. Therefore, failure to confirm a plan itself constitutes "cause" for dismissing a Chapter 11 petition. Once "cause" for conversion or dismissal of Chapter 11 case is demonstrated, debtor has the burden of proof to show that the "unusual circumstances" exception applies. In this case, "unusual circumstances" exception to dismissal or conversion did not apply because there was not a reasonable likelihood that a plan would be confirmed, and none of the "cause" grounds for converting or dismissing included an act or omission that was justifiable and curable. Conversion to Chapter 7, rather than dismissal of debtor's Subchapter V Chapter 11 case upon finding "cause," was in the best interests of creditors and the estate because a Chapter 7 trustee would be able to administer unencumbered assets and pursue avoidance actions for the benefit of unsecured creditors.

5. *In re Brendan Gowing, Inc.*, 661 B.R. 565 (Bankr. S.D. Tex. 2024)

Issue: Whether automatic stay imposed in previously dismissed small business case applied in debtor's subsequent Subchapter V case.

Holding: Automatic stay never came into effect in debtors' voluntary Subchapter V Chapter 11 case where their first small business bankruptcy case had been dismissed less than two years previously, and debtors did not demonstrate that they would confirm a feasible non-liquidating plan within a reasonable period of time.

6. *In re JKW Enterprises, LLC*, 660 B.R. 289 and 660 B.R. 296 (Bankr. N.D. Iowa, 2024).

Issue: Whether cause existed to dismiss or convert Subchapter V case.

Holding: United States Trustee established that debtors in jointly administered Subchapter V Chapter 11 cases filed their bankruptcy petitions in bad faith, supporting dismissal of bankruptcy cases for cause. While debtors had more than one asset, debtors were unable to meet current expenses and had negative cash flow, debtors had no employees, proceeding was a two-party dispute between debtors and secured creditor that had pending foreclosure actions in state court brought against debtors, debtors filed bankruptcy cases only two days after secured creditor had filed motion for default judgment in state court, and there were only a few unsecured creditors with small claim amounts compared to secured creditor.

7. *In re M.A.R. Designs & Construction, Inc.*, 653 B.R. 843 (Bankr. S.D. Tex. 2023)

Issue: Whether cause existed to dismiss or convert Subchapter V case.

Holding: Although Bankruptcy Code does not specifically enumerate bad-faith conduct as "cause" for conversion or dismissal of Chapter 11 case, bankruptcy courts nevertheless routinely treat conversion or dismissal for bad-faith conduct as implicitly authorized by the words "for cause.". In the context of a debtor who has ceased business operations and liquidated virtually all of its assets, any negative cash flow, including that resulting only from administrative expenses, effectively comes straight from the pockets of creditors and is sufficient to demonstrate best interests of creditors and the estate on motion to convert or dismiss Chapter 11 case for "cause" based on "substantial or continuing loss or diminution" theory. In this case, totality of the circumstances demonstrated "cause" to convert or dismiss debtor's case under Subchapter V of Chapter 11 based on bad faith for the following reasons: debtor was involved in fraudulent real estate transactions executed through its president, who pled guilty in state court to four counts of fraud, debtor intentionally failed to schedule certain liabilities against the estate even though debtor knew about those potential claims, debtor had little to no cash flow, debtor's only employee was its president, and debtor failed to accurately disclose information in its monthly operating reports and failed to timely file the reports, with no excuse provided for failing to provide the reports. Even if the court finds "cause" to convert or dismiss Chapter 11 case, the court must abstain from converting or dismissing the case if the court finds and specifically identifies unusual circumstances establishing that conversion or dismissal is not in the best interests of creditors and the estate. In this case, conversion of debtor's case under Subchapter V of Chapter 11 to one under Chapter 7, rather than dismissal, would be in the best interests of creditors and the estate, upon United States Trustee's (UST) requisite showing of "cause," where greater economic value would be produced in bankruptcy rather than outside of bankruptcy. A Chapter 7 trustee would be better positioned to investigate and effectively liquidate the numerous pieces of real estate owned by debtor, and there was widespread distrust of debtor to effectively liquidate.

8. *In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Vir. 2023)

Issue: Whether Subchapter V case should be dismissed for bad faith.

Holding: Where corporate debtor was ineligible for relief under Subchapter V of Chapter 11 as small business debtor because debtor's noncontingent liquidated liabilities exceeded $7.5 million Subchapter V debt limit, Bankruptcy Court would revoke the Subchapter V designation, rather than dismiss the case, because the only parties who would be better off from a dismissal of the case would be lessors. Further, lessors failed to show that corporate debtor filed its Chapter 11 case in subjective bad faith, as required to warrant dismissal. Instead, there was a landscape of economic uncertainty and debtor was seeking to limit its liabilities and pay its creditors what they were entitled to under the Bankruptcy Code so that it could service its debt, pay and retain its employees, pay trade creditors and turn a profit.

9. *In re Bin Hao*, 644 B.R. 339 (Bankr. E.D. Vir. 2022)

Issue: Whether Debtor's Subchapter V case should be dismissed or converted.

Holding: Debtor's bad faith conduct warranted conversion or dismissal of case under Subchapter V of Chapter 11 for "cause," where (i) debtor did not accurately and timely disclose all of his assets and was on his fourth set of schedules, each amendment being prompted by inquiries from the United States Trustee (UST) or the Subchapter V trustee, (ii) debtor had acknowledged that he needed to amend his schedules again to disclose, inter alia, cryptocurrency accounts, (iii) debtor had stated "none" when asked about transfers to family members when, in fact, he transferred funds to his cousin on two occasions, (iv) debtor's testimony that he understood the term transfers of "property" to be limited to transfers of real property was not credible because debtor was highly financially sophisticated, and (v) debtor had failed to pay post-petition domestic support obligations. Further, debtor's amended plan could not be confirmed on good faith grounds, demonstrating the absence of a reasonable likelihood of rehabilitation that supported conversion or dismissal of case for "cause," as debtor proposed to make a distribution to his unsecured creditors of one and a half cents on the dollar over a five-year period, which was a meaningless distribution, and debtor's amended plan was a liquidating plan, but his domestic support obligations and tax debt were both nondischargeable and would be nondischargeable under Chapter 7 as well. Conversion to Chapter 7 for "cause," rather than dismissal of debtor's case under Subchapter V of Chapter 11, was in the best interests of the creditors, as dismissal without prejudice would only invite debtor to file the same case a second time and there would be no resolution of creditors' claims outside of bankruptcy, whereas Chapter 7 trustee could evaluate the claims objectively and pursue them if they were available for the benefit of the creditors.

10. *In re National Small Business Alliance, Inc.*, 642 B.R. 345 (Bankr. D.C. 2022)

Issue: Whether Court can revoke Subchapter V designation.

Holding: A court cannot order a Subchapter V debtor to convert to a "standard" Chapter 11, but instead must order the debtor's petition to be amended to revoke the election to proceed under Subchapter V. The ability to revoke a Subchapter V election is consistent with the Bankruptcy Code and the Congressional goals of ensuring that Subchapter V cases provide a quicker reorganization process. If a debtor discovers post-petition that it is unable to meet the deadlines of Subchapter V, the option to revoke such designation provides the ability to continue to attempt to reorganize under the rigors and requirements of standard chapter. In this case, post-petition revocation of Chapter 11 debtor's election to proceed under Subchapter V was warranted, with appointment of Chapter 11 trustee immediately upon revocation, since debtor had committed client base with significant potential for growth, debtor's case did not progress with expediency Subchapter V case was expected to achieve, debtor's five attempts to propose confirmable plan were unsuccessful, case was largely dominated by two very active creditors attempting to litigate claims amongst themselves and against debtor without regard to debtor's estate as whole or its clients, and debtor remaining in Chapter 11 rather than liquidating under Chapter 7 or case being dismissed was best interest of creditors and estate.

11. *In re Outta Control Sportfishing, Inc.*, 642 B.R. 180 (Bankr. S.D. Fla. 2022)

Issue: Whether Subchapter V case should be dismissed.

Holding: There is no particular test for determining whether debtor has filed Chapter 11 petition in bad faith, as may warrant dismissal for "cause"; instead, the determination of cause is subject to judicial discretion under the circumstances of each case. In determining bad faith in filing Chapter 11 petition, courts may consider the following factors: (1) debtor has only one asset in which it does not hold legal title; (2) debtor has few unsecured creditors whose claims are small in relation to claims of secured creditors; (3) debtor has few employees; (4) property is subject of foreclosure action as result of arrearages on debt; (5) debtor's financial problems involve essentially dispute between debtor and secured creditors which can be resolved in pending state court action; and (6) timing of debtor's filing evidences intent to delay or frustrate legitimate efforts of debtor's secured creditors to enforce their rights. In this case, corporate debtor that operated sport fishing charter business filed bankruptcy petition under Subchapter V of Chapter 11 in bad faith, warranting dismissal for "cause," where petition was filed as a result of two-party dispute for sole purpose of gaining advantage in foreclosure action for nonpayment of disputed preferred ship mortgage by avoiding posting of bond in order to regain possession of arrested vessel, timing of bankruptcy filing suggested an intent to forum shop, and debtor had very few assets or creditors and had only one employee.

12. *In re Ozcelebi*, 639 B.R. 365 (Bankr. S.D. Tex. 2022)

Issue: Whether Subchapter V case should be converted to Chapter 7.

Holding: (1) United States Trustee (UST) failed to demonstrate "cause" to convert or dismiss debtor's case filed under Subchapter V of Chapter 11 based on substantial or continuing loss to the estate or diminution in value of the estate. Although UST asserted that, inter alia, debtor received distributions from various trusts throughout pendency of bankruptcy case, debtor's schedules identified the trusts as spendthrift trusts, court was unable to conclude that debtor was entitled to receive or received disbursements within 180 days of filing his bankruptcy petition, and UST offered no evidence establishing that the trusts had any net income post-bankruptcy.

(2) UST established "cause" to convert or dismiss debtor's case for gross mismanagement of the estate based on numerous inaccuracies in debtor's monthly operating reports, overdrafts of his debtor-in-possession account, $22,698.58 in unaccounted for cash withdrawals, and $5,000 reported as Subchapter V trustee fees when trustee was never actually paid, which, taken together, left the court and all parties in interest with an inaccurate picture of debtor's financial condition.

(3) Debtor's bad faith established "cause" for conversion or dismissal of case . Debtor's schedules and statement of financial affairs were not true, complete, or correct; debtor failed to disclose several insurance policies in his name; failed to disclose his business connection to limited liability company of which he was a member; withheld information regarding credit cards; failed to disclose his possession and control of vehicle that was owned by his medical clinic; concealed the true value of assets in which he had an interest, including interests in trusts which debtor denoted as "unknown" when debtor never attempted to value his interest in the trusts; and evidence demonstrated that the trusts were in fact of significant value with debtor averaging about $190,000 in trust distributions per year for recent two-year period; and debtor inflated his liabilities to mislead creditors and avoid the appearance of a two-party dispute.

(4) Conversion of case under Subchapter V of Chapter 11 to Chapter 7, after finding "cause" based on debtor's bad faith, was in the best interests of creditors and the estate, rather than dismissal. Dismissal of the case was unlikely to result in recovery for debtor's unsecured creditors, and given the numerous findings of bad faith and misconduct in the case, a Chapter 7 trustee was in the best position to supervise the estate to ensure the protection of both the estate and the interest of debtor's creditors.

13. *In re Pittner*, 638 B.R. 255 (Bankr. D. Mass. 2022)

Issue: Whether case should be converted to Chapter 7 or dismissed.

Holding: Debtor's failure to comply with order to file either a motion to employ a real estate broker or a motion to sell real property, after failing to provide compelling or satisfactory reason for not selling the property during the bankruptcy case, established "cause" to dismiss or convert case under Subchapter V of Chapter 11 to Chapter 7.

14. *In re Keffer*, 628 B.R. 897 (Bankr. S.D. W.Vir. 2021)

Issue: Could debtor convert from Chapter 13 to Subchapter V and then extend the Subchapter V deadlines?

Holding: Debtor qualified for conversion under Code § 1307(d) and the amended proof of claim by the IRS was not within the debtor's control and thus the debtor is eligible for Subchapter V because an extension of the deadlines under Code § 1188 and 1189 are appropriate.

E. EMPLOYMENT ISSUES

1. *In re Soul Wellness LLC*, 669 B.R. 848 (Bankr. S.D. Fla. 2025)

Issue: Whether debtor's bankruptcy counsel can be paid a post petition retainer.

Holding: In determining whether to approve bankruptcy counsel's request for a postpetition retainer, among factors court should consider are (i) whether case is unusually large one in which exceptionally large amount of fees accrue each month, (ii) whether waiting extended period for payment would place undue hardship on counsel, (iii) whether counsel can respond to any reassessment by posting a bond or otherwise, (iv) whether retainer was specifically disclosed and was subject of a noticed hearing prior to any payment, (v) whether terms of agreement make clear that any amounts paid will be held in trust until final fee application is approved or other agreed-upon time, (vi) whether employment application and proposed terms of retainer are reasonable and tailored to particular circumstances of the case, and (viii) whether retainer is appropriate exercise of debtor's business judgment. In this case, Bankruptcy Court declined to approve proposed postpetition retainer characterizing $3,500 of Subchapter V Chapter 11 debtor's monthly payments to its bankruptcy counsel's trust account as retainer available only to pay counsel, as opposed to estate property held in trust in case of administrative insolvency. Although counsel's employment application contained adequate disclosures, in that retainer agreement was attached to it, and

counsel's prepetition familiarity with debtor, its principal, and its employees surely played role in counsel's decision to take representation on relatively small prepetition retainer, the motion was denied for the following reasons: (i) counsel brought nothing unique to case different than any other firm accepting a similar engagement, (ii) the United States Trustee (UST) had raised limited objection to the retainer, (iii) the case was not of a size or exceptional nature to warrant the retainer given resolution of debtor's dispute with landlord, and (iv) the lack of retainer would not create undue hardship for counsel.

2. *In re MFP Infrastructure Solutions, Inc.*, 654 B.R. 922 (Bankr. N.D. Ill. 2023)

Issue: Whether counsel for Subchapter V debtor should be allowed fees and expenses**.**

Holding: Time spent by counsel for Subchapter V Chapter 11 corporate debtor on office conferences and meetings between two lawyers that were necessary and brief did not entail unnecessary duplication of services that would warrant reduction of requested attorney fees. Because an intraoffice conversation or meeting always requires at least two lawyers, allowing only one to bill the time, pursuant to Code § 330(a)(4)(A)(i) prohibiting court from allowing compensation for a professional's unnecessary duplication of services, is unfair. The lawyer who converses with a second lawyer about a case has spent time on the conversation he could have spent on something else, and if he cannot bill for the conversation, he goes uncompensated. Reduction by $530 of attorney fees requested by counsel for Subchapter V Chapter 11 corporate debtor in amount of $47,556.83 was appropriate to account for four instances when counsel billed different amounts of time for the same conversations. Counsel offered no explanation why amounts of time were inconsistent, and so the court would assume that the shortest time was correct.

3. *In re Aknouk*, 2023 WL 2344268 (Bankr. S.D.N.Y. Mar. 3, 2023)

Issue: Whether patient care ombudsman should be appointed in Subchapter V case.

Holding: The fact that this case was a small business bankruptcy under Subchapter V of Chapter 11, with an appointed Subchapter V trustee, weighed against appointing a patient care ombudsman to monitor the quality of patient care and to represent the interests of debtor's patients. While Subchapter V trustee did not provide the same level of oversight as a patient care ombudsman would, the Subchapter V trustee was an extra safeguard against patient care issues that gave the Bankruptcy Court additional comfort that debtor's operations were being monitored.

4. *In re Golden Fleece Beverages, Inc.*, 2021 WL 6015422 (Bankr. N.D. Ill., Nov. 24, 2021)

Issue: Whether the post-petition retainer in the amount of $70,000 for the employment of debtor's counsel was permissible under the Bankruptcy Code.

Holding: In overruling the objection of the U.S. Trustee to the debtor's application to employ bankruptcy counsel with a $70,000 post-petition retainer, the Bankruptcy Court held that Code

363(b) can be used as the basis of a court's authorization to use property of the estate to pay a postpetition retainer to a debtor in possession's chosen professional.

5. *In re Ozcelebi*, 631 B.R. 629 (Bankr. S.D. Tex. 2021)

Issue: Whether first interim fee application of debtor's counsel in the amount of $188,358.11 should be approved.

Holding: In case filed under Subchapter V of Chapter 11 in which bankruptcy counsel's first interim fee application sought, inter alia, to draw down its prepetition retainer in the amount of $69,394.48, including $9,999 in prepetition time, the $9,999 sought by counsel was permissible under Code § 1195, which expressly provides that a person was not disqualified for employment in a Subchapter V case solely because that person held prepetition claim of less than $10,000 against debtor. Further the objecting creditor's unproven accusation that all or part of bankruptcy counsel's retainer consisted of funds that were part of debtor's fraudulent transfer scheme was not basis to deny firm interim reimbursement for its professional fees and expenses. Counsel disclosed the agreed-to compensation prepetition and detailed the services performed in sufficient detail to apprise an interested party and the bankruptcy court of the actual, reasonable, and necessary costs of services rendered, creditor's allegation, though serious, was unsupported, and the court declined to penalize counsel for any alleged misbehavior of its client that was yet to be proven.

F. TRUSTEE AND COMMITTEE ISSUES

1. *In re Cinemex Holdings USA, Inc.*, 2025 WL 2489585 (Bannkr. S.D. Fla. Aug. 28, 2025)

Issue: Whether committee of unsecured creditors should be appointed in Subchapter V case.

Holding: While Bankruptcy Code does not specify what constitutes "cause" to appoint a creditors' committee in a Subchapter V Chapter 11 case, whether to do so is within the court's discretion. When determining whether there is "cause" to appoint a creditors' committee in a Subchapter V Chapter 11 case, court considers the following nonexclusive list of factors: (1) the size and complexity of the case (whether the case is one which more closely resembles a traditional Chapter 11 case); (2) the number of creditors involved in the case and the nature of their debt; (3) the nature of the debtor's assets; (4) the nature of the debtor's business and how it is regulated; (5) the amount of secured debt, the number of secured creditors, and the nature of the collateral in which such creditors assert a lien; (6) whether and to what extent any other creditor or other party in interest supports the relief requested; and (7) whether there are any other factors present in the case which would interfere with the ability of the Subchapter V trustee to perform his or her normal statutory duties effectively. In this case, creditor failed to establish cause to appoint official committee of unsecured creditors in debtors' Subchapter V Chapter 11 cases. While the reorganized debtors previously filed and successfully reorganized under a traditional Chapter 11 case, the instant cases were filed under Subchapter V with the primary and limited goal of shedding leases, of which there were only 28, which was not complicated. Further, no other party in interest joined in creditor's motion, and creditor's argument that unsecured creditors in the cases needed a unified voice was not supported by the number of creditors or the nature of their debt because the

unsecured creditors were primarily landlords, with some vendors, and number of scheduled creditors was in the hundreds at most.

2. ***In re Carolina Sleep Shoppe, LLC*, 670 B.R. 764 (Bankr. W.D.N.C. 2025)**

Issue: Whether a Subchapter V trustee can be discharged in a non-consensual case confirmed under Code § 1191(b).

Holding: Courts have generally held that "the determination of whether to discharge a Subchapter V trustee" in a case with a plan non-consensually confirmed under section 1191(b) of the Bankruptcy Code "is a matter of discretion and should be determined based upon the particular facts and circumstances of each case. See *In re Florist Atlanta, Inc.,* 2024 WL 3714512 (Bankr. N.D. Ga. Aug. 7, 2024) where the court ordered that a Subchapter V trustee be discharged following substantial consummation and the filing of the final report because "the Debtor will make plan payments in this case," leaving "nothing [for the Subchapter V trustee] to do after filing the final report, subject to the possible occurrence of future events that would require trustee services."

3. ***In re Turkey Leg Hut & Company, LLC*, 659 B.R. 539 (Bankr. S.D. Tex. 2024)**

Issue: Whether Subchapter V trustee has standing to bring a claim on behalf of the debtor.

Holding: Bankruptcy Court's order deciding whether temporary restraining order should issue in adversary proceeding brought by Subchapter V Chapter 11 trustee against spouse of debtor limited liability company's representative was interlocutory in nature, and therefore could be entered without a determination of the Court's constitutional authority to enter a final judgment. The order did not decide everything the trustee asked the Court to decide, namely, whether to grant temporary injunctive relief and impose a preliminary injunction. Debtor in possession had exclusive standing to pursue estate causes of action, and therefore Subchapter V trustee lacked statutory standing to bring claims on behalf of debtor limited liability company against spouse of debtor's representative requesting temporary restraining order to enjoin representative's spouse from interfering with debtor.

4. ***In re 218 Jackson LLC*, 631 B.R. 937 (Bankr. M.D. Fla. 2021)**

Issue: Whether cause existed to remove Subchapter V trustee.

Holding: Professionals engaged in conduct of bankruptcy case should be free of slightest personal interest which might be reflected in their decisions concerning matters of debtor's estate or which might impair high degree of impartiality and detached judgment expected of them during the court of administration. It is not the role of a Subchapter V trustee to thwart debtor's efforts to reorganize and to take the side of secured creditors; rather, the trustee is to try to bring the parties together, to facilitate a consensual plan. Subchapter V trustee in this case was not disinterested for the

following reasons: (i) trustee represented creditor in another bankruptcy case that was actively pursuing litigation against owner and manager of debtor, (ii) even if his interest was indirect, and so would be treated as equivalent of equity security holder, creditor was materially adverse to debtor's principal, as he had sued bankrupt airline and debtor's principal, who was chair of airline's board of directors, for misappropriation of trade secrets, it had obtained stay relief to continue its litigation against debtor's principal, and it had substantial claim, seeking over $12 million in its complaint and $25 million in airline's bankruptcy, and (iii) trustee had been openly and actively adverse to debtor since case's inception. Further the court denied Subchapter V trustee's request for compensation totaling $11,870 and ordered disgorgement of all monthly amounts received to date due to trustee's conflict, his requested fees were not reasonable or necessary, as his services had only hindered the process, and his services were not reasonably likely to benefit the estate.

5. *In re Penland Heating and Air Conditioning, Inc.*, 2020 WL 3124585 (Bankr. E.D.N.C. June 11, 2020)

Issue: Whether trustee appointed in Subchapter V case has right to employ attorney.

Holding: "The Trustee does not need legal assistance to fulfill his basic duties to monitor and facilitate the Debtor's reorganization. If during the case the Trustee identifies a specific need for the employments of an attorney or other professional, then the court will consider another request."

6. *In re Tri-State Roofing*, 2020 WL 7345741 (Bankr. D. Idaho Dec. 7, 2020)

Issue: Whether fees of Subchapter V Trustee should be approved under Code § 330 and capped at 5%. of disbursements.

Holding: Trustee fees of $1,920 should be determined under Code § 330(a)(1) and were reasonable. The Court concluded that Code § 326(b) does not present a bar to the Trustee to obtain compensation under § 330(a)(1), nor does it place a 5% cap on such compensation.

G. PLAN CONFIRMATION

1. Interim Bankr. Rule 3017.2 was added in 2020 to authorize the applicable bankruptcy court to take the following actions:

(1) fix a time for holders of claims and interests to accept or reject a debtor's plan,
(2) fix a date on which an equity security holder must be the holder of record to be eligible to accept or reject the debtor's plan,
(3) fix a date for the hearing on confirmation, and
(4) fix a date for transmitting a plan and a notice of the time within which the holders of claims and interest may accept or reject a plan.

2. *In re Hal Luftig Co., Inc.*, 667 B.R. 638 (Bankr. S.D.N.Y. 2025)

Issue: Whether plan should be approved that extended the duration of the automatic stay for claims against the debtor's president during the five year life of the proposed plan.

Holding: There is an exception to general rule that the automatic stay does not apply to nondebtors. The automatic stay can be extended to nondebtors where claims against the nondebtor will have immediate adverse economic consequence for debtor's estate, such as in actions where there is such identity between debtor and third-party defendant that debtor may be said to be the real party defendant**.** In this case, the duration of the automatic stay extension proposed by the debtor as part of its nonconsensual Subchapter V Chapter 11 plan — an existing nondebtor stay extension applicable to debtor's president — for the five-year life of the debtor's contemplated plan did not render the proposed extension impermissible. The proposed nondebtor stay extension was consistent with Code § 362(c)(2) governing continuation of automatic stay with respect to debtors, duration, in the aggregate, of certain nondebtor stay extensions approved in other cases could amount to a preliminary injunction with comparable duration as that proposed by debtor in case at bar, and, under facts and circumstances of case, proposed extension, which included automatic stay and injunction enjoining judgment creditor from enforcing against president its $2.6 million judgment for which debtor and president were jointly and severally liable, could extend for life of plan.

In applying, post-*Purdue Pharma*, 144 S.Ct. 2071, the four-factor preliminary injunction analysis used in determining whether to grant extensions of the automatic stay to nondebtors, such as a debtor's nondebtor management, bankruptcy courts should evaluate the "likelihood of success on the merits" factor as suggested by *Parlement Technologies*, 661 B.R. 722, whereby one consideration is whether providing debtor's management a breathing spell from the distraction of other litigation is necessary to permit debtor to focus on the reorganization of its business.

Furthermore, the permissive language used in Code § 1191(c) setting forth what it means for a Subchapter V Chapter 11 plan to be "fair and equitable," in stating that the condition that a plan be fair and equitable with respect to each class of claims or interests "includes" the specified requirements, provides bankruptcy courts with discretion to consider additional factors related to the enumerated requirements. In this case, the nonconsensual Subchapter V Chapter 11 plan proposed by debtor, a theater production company, was not "unfair and inequitable" on the basis that it did not provide appropriate remedies to interested parties in the event debtor failed to make its plan payments. The Bankruptcy Court previously had found that, given debtor's past volatile

profitability, a back-stop commitment was necessary to satisfy the Bankruptcy Code's requirement that, for plan to be confirmed, there had to be reasonable likelihood that debtor would be able to make all plan payments, consistent with that ruling proposed plan explicitly provided for back-stop commitment requiring debtor's president to contribute up to $100,000 to fund plan if debtor defaulted on plan payments, and debtor had to confirm availability of back-stop commitment as condition precedent to plan's effective date.

3. ***In re Frontline Medical Services LLC*, 665 B.R. 818 (10th Cir. BAP 2024)**

Issue: Whether debtor's case was in "good faith" and whether plan should be approved

Holding: Bankruptcy court considers nonexclusive list of *Laguna* factors, 30 F.3d 734, 738 (10th Cir. 1994), in analyzing whether a debtor filed for Chapter 11 relief in good faith, namely, whether: (1) debtor has one asset, (2) prepetition conduct of debtor has been improper, (3) there are only a few unsecured creditors, (4) debtor's property has been posted for foreclosure, and debtor has been unsuccessful in defending against foreclosure in state court, (5) debtor and one creditor have proceeded to a standstill in state-court litigation, and debtor has lost or has been required to post a bond which it cannot afford, (6) filing of petition effectively allows debtor to evade court orders, (7) debtor has no ongoing business or employees, and (8) possibility of reorganization is lacking. In this case, the Bankruptcy Court's finding that, under the *Laguna* test, 30 F.3d 734, Chapter 11 debtor did not exhibit bad faith in filing its subchapter V petition or in proposing its plan, even if debtor's case was primarily a two-party dispute with law firm that had represented it in prepetition matter involving Department of Veterans Affairs (VA) for the following reasons: (i) the debtor was supported by evidence that debtor filed petition for legitimate purpose of reorganizing an ongoing business that was unable to pay substantial, unanticipated legal fees, (ii) that the debtor had more than one asset and sufficient cash flow to pay its operating expenses, (iii) that the debtor did not engage in improper prepetition conduct in connection with the VA dispute, (iv) that the debtor had not lost prepetition state-court lawsuit that law firm brought against it to recover firm's fees, and (v) that the debtor had shown likelihood of reorganization.

As to confirmation of the debtor's plan, when no class of claims or interests votes to reject a subchapter V Chapter 11 plan, it is considered "consensual," for confirmation purposes. On the other hand, if a class of claims or interests votes to reject a proposed subchapter V Chapter 11 plan, the plan is "nonconsensual," for confirmation purposes and the bankruptcy court must find that the plan passes the subchapter V "feasibility test" under Code § 1191(c)(3) in order to confirm it. In this case, the Bankruptcy Court did not apply the correct legal standard when analyzing the feasibility of the proposed plan. Although the Court made a detailed analysis in determining that debtor satisfied its burden of proving confirmation of its plan was not likely to be followed by its liquidation or the need for further financial reorganization, and thus was fair and equitable, in doing so the Court applied the standard for consensual plans, and it failed to explicitly find that debtor would be able to make all payments under the proposed plan, or that there was a reasonable likelihood that it would be able to make all payments and the plan provided for appropriate remedies if payments were not made.

4. *In re Premier Glass Services, LLC*, 664 B.R. 465 (Bankr. N.D. Ill. 2024)

Issue: Whether debtor's Subchapter V plan was "fair and equitable."

Holding: The debtor bears the burden of showing the bankruptcy court that proposed nonconsensual Subchapter V Chapter 11 plan's treatment of disposable income is "fair and equitable." Debtor must also provide projections demonstrating its ability to make payments under the proposed plan and explain how it is calculating its projected disposable income. To satisfy its burden of showing that its proposed plan is fair and equitable, debtor must show a "sincere effort" regarding two things: first, it must show that there is a reasoned basis for its projections, and second, it must show that line items deducted from disposable income are indeed necessary for the continuation, preservation, and operation of the debtor's business, and therefore "fair and equitable" to unsecured creditors. Because looking into the financial future is not an exact science, a small business debtor's projections demonstrating its ability to make payments under its proposed nonconsensual plan deserve some deference. If the debtor's actual income is lower than projected, the debtor must nonetheless pay the full amount as projected in its plan, but it may ask the court to approve a modification. If the debtor's actual income is higher than projected, those gains inure only to the debtor's benefit: creditors cannot ask for debtor's payments to increase.

In this case, the Subchapter V Chapter 11 debtor-limited liability company (LLC), a commercial glass repair business, failed to show that its disposable-income projections' line-item deduction for taxes had the reasoned basis required for its proposed nonconsensual plan to be "fair and equitable." Although, given debtor's status as pass-through entity, it may have been necessary for it to calculate income on after-tax basis, trustee, who prepared tax projections, could not explain basis for his calculations, in large part because he made them based only on information provided by debtor. Also the projections were based on historical data which was not furnished to Bankruptcy Court and as to which trustee had little knowledge, on what was "fair to project going forward," and neither debtor nor trustee could explain where seemingly arbitrary numbers on spreadsheet came from, how they related to debtor's income, or on what basis debtor historically made tax reimbursements to principals. Furthermore, the court found that the primary focus of the plan was to evade paying a creditor rather than commit the debtor's total projected disposable income and thus was not "fair and equitable."

5. *In the Matter of Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga, 2024)

Issue: Whether Subchapter V plan should be confirmed.

Holding: Bankruptcy Code lists three alternative ways that a Chapter 11 plan may treat a secured claim to meet the "fair and equitable" confirmation requirement, including (1) retention of the lien securing the claim to the extent of the allowed amount of the claim, and deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property, (2) the sale, subject to the section of the Code governing use, sale, or lease of property, of any property that is subject to the lien, or (3) the realization of the indubitable equivalent of such claim. Where a Chapter 11 plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the "good faith" requirements of the section of the Bankruptcy Code

governing confirmation of Chapter 11 plans are satisfied. In this case, debtor, which operated a gas station and convenience store, proposed its nonconsensual subchapter V plan in good faith when faced with creditor's $2.375 million judgment against it. Debtor could have filed Chapter 7 or simply closed and dissolved its business, but instead reorganized under Chapter 11 and negotiated a plan with concessions from its principal and its landlord that made its three-year plan more beneficial to creditors than even a five-year plan without such concessions. Debtor was not required to demonstrate its intent to continue operating indefinitely to show good faith. Debtor provided reliable monthly operating reports and financial projections prepared by experienced CPA. Further, Debtor did not act in bad faith by deciding not to pursue an insurance-related breach-of-fiduciary-duty claim against its principal or a claim against its landlord for an interest in the leased property, and plan could provide for principal to retain his equity interest in debtor.

6. *In re Nelkin & Nelkin, P.C.*, 662 B.R. 550 (Bankr. S.D. Tex. 2024)

Issue: Whether Subchapter V plan should be approved.

Holding: Amended plan of reorganization proposed by debtor under Subchapter V of Chapter 11 failed to provide for appropriate default remedies, and thus plan could not be confirmed. Although plan stated that a certain individual would guarantee the minimum quarterly plan payments, that individual testified that no guarantee agreement had been provided to debtor or the creditors, and individual offered no financial documentation to support her contention that she had the necessary funds. Also, the plan was not feasible, and thus plan could not be confirmed. In the two and a half years preceding bankruptcy, debtor earned significantly less than the plan's projected revenue, and debtor offered little evidence to support finding that the recent improvement in revenue would continue to the level speculated in the plan's projections.

7. *In re Florist Atlanta, Inc.*, 2024 WL 3714512 (Bankr. N.D. Ga. Aug. 7, 2024)

Issue: Whether plan is consensual under Code § 1191(a) when non creditor in a class votes or otherwise objects to the plan

Holding: The Court held that acceptance for purposes of Code § 1129(a)(8) requires affirmative acceptance by the class and thus the confirmation of the plan had to be a cramdown under Code § 1191(b). As to the post-confirmation duties of the Trustee, the Court held that "the debtor's plan does not contemplate that the Subchapter V Trustee perform any duties after its substantial consummation, and no one has requested that the Trustee file any postconfirmation reports. Parties at the confirmation hearing agreed that no need exists in this case for the Subchapter V Trustee to provide any postconfirmation services. Because the Debtor will make plan payments in this case, the Subchapter V Trustee will have nothing to do after filing the final report, subject to the possible occurrence of future events that would require trustee services. . . . In these circumstances, it is appropriate for the Court to order the termination of the services of the Subchapter V Trustee upon substantial consummation of the plan (which will occur when the debtor commences plan payments) and the filing of the Subchapter V Trustee's final report."

8. *In re 303 Investments, Inc.*, 2024 WL 3355196 (Bankr. D. Colo. June 24, 2024)

Issue: Whether the debtor's Chapter 11 Subchapter V Plan was proposed in good faith and was fair and equitable.

Holding: Corporate debtor's proposed Subchapter V Chapter 11 Plan provided clear obligations to the debtor, as required for confirmation, by including a brief history of the business operations, a liquidation analysis, and projections with respect to the ability of the debtor to make payments required under the Plan. Further, the court held that the corporate debtor's proposed Subchapter V Chapter 11 Plan (i) met applicable statutory requirements for confirmation of nonconsensual Plan, (ii) Plan classified claims in an appropriate manner, with secured claims separately classified according to respective collateral, (iii) the Plan specified treatment of impaired classes and did not discriminate between the holders of claims in any particular class, and (iv) the Plan provided for adequate means of the Plan's implementation, and (v) the Plan was proposed in good faith because there can be no bad faith in a Subchapter V Chapter 11 plan that proposes to modify a claim in a way that the Bankruptcy Code allows. In this case, the debtor utilized the bankruptcy process to negotiate a plan that had been accepted by all of its creditors with the exception of one creditor, length of time the case had been in Chapter 11 was due to extensive efforts made by debtor to comprehensively settle litigation and present a consensual plan, and there was a reasonable likelihood the plan would achieve its intended results which were consistent with the purposes of the Bankruptcy Code.

9. *In re Trinity Family Practice & Urgency Care PLLC*, 661 B.R. 793 (Bankr. W.D. Tex. 2024).

Issue: Whether the debtor's Chapter 11 Subchapter V Plan was proposed in good faith and was fair and equitable.

Holding: Debtor's plan was proposed in good faith and not by any means forbidden by law. Subchapter V of Chapter 11 gives the Bankruptcy Court the sole authority and discretion to fix a plan payment period longer than the baseline or "default" three-year period, however, the debtor failed to show that its proposed three-year period for plan payments was "fair and equitable."

10. *In re Packet Construction, LLC*, 2024 WL 1926345 (Bankr. W.D. Tex. April 30, 2024)

Issue: Whether Subchpater V plan should be approved when the plan did not provide a "true up" if the debtor's actual disposable income exceeds projections.

Holding: Subchapter V Chapter 11 debtor limited liability company was not required to "true up" payments to creditors, i.e., pay more if actual disposable income exceeded projections, absent any special circumstances warranting consideration of a departure from general rule that Subchapter V debtors were not required to "true up" payments to creditors.

11. *In re Trimax Medical Management, Inc.*, 659 B.R. 398 (Bankr. M.D. Ga., 2024.

Issue: Whether Subchapter V plan should be confirmed

Holding: Debtor-expense sharing management company's allocation of expenses did not demonstrate bad faith, as might warrant denial of confirmation of proposed Subchapter V Chapter 11 plan. Plus, debtor-expense sharing management company accurately assessed liquidation value of its accounts receivable, including $0 for company that was also owned in part by debtor's sole owner/operator and owed debtor over $2.7 million in unpaid management fees, because debtor determined that company was insolvent and collection against its receivable would not profit the estate's unsecured creditors.

Debtor's proposed Subchapter V Chapter 11 plan was fair and equitable, for purposes of confirmation. Debtor provided a budget for its operations under the plan which applied all of debtor's projected disposable income to payments, and while objecting creditor raised questions as to the reasonableness of certain expenses listed on the budget, removing expenses would reduce the amount by which debtor's profit percentage was calculated, reducing debtor's income and creditor's potential recovery, because debtor planned to charge its customers an additional percentage of debtor's expenses as a profit. Additionally, the Bankruptcy Court approved trustee's and debtor's agreement as to distribution of proposed Subchapter V Chapter 11 plan's proceeds, whereby debtor would continue to directly pay its secured creditors while trustee would manage distributions to unsecured creditors, even though debtor neither affirmed nor denied the agreement on the record.

12. *In re Trinity Legacy Consortium*, 656 B.R. 429 (Bankr. N.M. 2023)

Issue: Whether debtor should be allowed extension to file Subchapter V plan.

Holding: The court applied an **e**quitable inquiry as standard for granting extension of time to file plan under Subchapter V of Chapter 11. In determining whether extension of time was needed due to circumstances for which the debtor should not justly be held accountable, term "justly" allowed court to take into account all relevant circumstances surrounding debtor's need for extension of time to file plan and to balance interests of affected parties. In striking balance under equitable inquiry for granting extension of time to file plan under Subchapter V of Chapter 11, court should be guided by overarching goals of Subchapter V to provide process by which debtors may reorganize and rehabilitate their financial affairs, provide framework for expeditious and economical resolution of case under Subchapter V, and facilitate development of consensual plan. Extension of time for debtor to file plan under Subchapter V of Chapter 11 was appropriate, where debtor was close to concluding its negotiations in mediation with two major creditors in an effort to file a consensual plan, the court had already granted several extensions of time for debtor to file plan without objection by any creditors after notice, there was no evidence that debtor acted in bad faith, and while debtor could have filed a placeholder plan by deadline and then modified the plan before confirmation hearing, the more appropriate course of action would be for debtor to receive the extension so it could file a meaningful plan designed to be taken to confirmation hearing.

13. *In re Hal Luftig Co., Inc.*, 655 B.R. 508 (Bankr. S.D.N.Y., 2023)

Issue: Whether Subchapter V plan that contained a release of third parties should be confirmed.

Holding:

Under the Second Circuit's *Purdue Pharma* test, 69 F.4th 45, for evaluating propriety of Chapter 11 plan's proposed nonconsensual third-party release, courts consider whether: (1) there is identity of interests between debtors and released third parties, including indemnification relationships, such that suit against nondebtor is, in essence, suit against debtor or will deplete assets of the estate, (2) claims against debtor and nondebtor are factually and legally intertwined, including whether debtors and released parties share common defenses, insurance coverage, or levels of culpability, (3) scope of releases is appropriate such that its breadth is necessary to the plan, (4) releases are essential to reorganization, (5) nondebtor contributed substantial assets to reorganization, (6) impacted class of creditors "overwhelmingly" voted in support of plan with releases, and (7) plan provides for fair payment of enjoined claims.

In this case, the proposed Subchapter V plan of reorganization of a theater production company, which contained a nonconsensual third-party release purporting to release certain claims against debtor's nondebtor principal, was fair and equitable, as required for confirmation. Although debtor's profitability had apparently been volatile in the past, debtor's principal was proffering a back-stop commitment to contribute up to $100,000 to the extent necessary to satisfy the subsection of the Bankruptcy Code requiring that, for a plan to be "fair and equitable," the value of property to be distributed must not be less than the projected disposable income of the debtor.

Later in *In re Hal Luftig Company, Inc.*, 2024 WL 1197702 (S.D.N.Y. March 19, 2024), the court held that even if nonconsensual third-party releases are permissible in a Subchapter V case (which this opinion does not decide in a case that is not 'rare and exceptional') the fact that a Subchapter V plan can be confirmed without any creditor support does not eliminate the sixth *Purdue Pharma* requirement that "the impacted class of creditors overwhelmingly voted in support of the plan with the releases."

14. *In re Hotz Power Wash, Inc.*, 655 B.R. 107 (Bankr. S.D. Tex. 2023)

Issue: Whether fifth amended Subchapter V plan should be approved.

Holding: A nonvoting impaired creditor class should not be treated as having implicitly accepted or rejected a Subchapter V Chapter 11 plan for confirmation purposes but, instead, should not be counted. Bankruptcy Code is silent on correct treatment of a nonvoting class, acceptances and rejections must satisfy formality requirements set forth in bankruptcy rule governing proper form of acceptance or rejection of Chapter 11 plans. Treating nonvoters as rejecters would defeat policy goals of Subchapter V, and calculation mandated by Code subsection setting forth number and amount of votes necessary for plan to be deemed accepted, which requires number of accepting votes to be divided by total votes cast in class, creates a mathematically undefined result that is absurd when applied to a nonvoting class, thus leaving court with one option, namely, to ignore a nonvoting class. In this case, Debtor's proposed fifth amended Subchapter V plan of reorganization satisfied the requirement that a Chapter 11 plan can only be confirmed if, with

respect to each impaired class of claims or interests, such class has accepted the plan, where the plan contained three impaired classes, two of the impaired classes voted to accept the plan, and one impaired class did not vote. The nonvoting impaired class would not be counted.

15. *In re Central Florida Civic, LLC*, 649 B.R. 77 (Bankr. M.D. Fla. 2023)

Issue: Whether Subchapter V plan granting plan injunction to temporarily enjoin creditors from pursuing their guaranty claims against non-debtors should be approved.

Holding: Chapter 11 debtor and its non-debtor principals shared identity of interests that weighed in favor of granting plan injunction to temporarily enjoin creditors of debtor from pursuing their guaranty claims against non-debtors. The factors supporting the plan provision included the fact that non-debtors would expend substantial time and energy on those creditors' litigation if subject to continued litigation related to those guaranty claims, Subchapter V Trustee recognized debtor's business would suffer absent injunction, as would prospects for successful reorganization, because non-debtors' professional services were vital to debtor's post-confirmation operations, and any judgments resulting from that litigation likely would lead to repossession of five trucks owned by non-debtors, which were used for debtor's business and would diminish resources of debtor.

Also, Non-debtor principals of Chapter 11 debtor were making substantial contribution to debtor's reorganization, weighing in favor of granting plan injunction to temporarily enjoin creditors of debtor from pursuing their guaranty claims against non-debtors. These contributions included requirement that non-debtors contribute $5,000 annually for total of $25,000 over five-year plan term, which nearly doubled projected monthly payments to unsecured creditors, and one non-debtor performed post-petition services without compensation.

Further amended Chapter 11 plan provided non-consenting claimants opportunity to recover in full, weighing in favor of plan injunction to temporarily enjoin creditors of debtor from pursuing their guaranty claims against non-debtor principals of debtor. Court found that recovery in full was not certain even without injunction, injunction essentially maintained status quo between enjoined creditors, including non-consenting claimants and non-debtors, and prejudice to non-consenting claimants was limited because they could proceed with collection once injunction ended because amended plan provided for tolling of all applicable statutes of limitations.

16. *In re Staples*, 2023 WL 119431 (M.D. Fla. Jan. 6, 2023).

Issue: Whether Subchapter V plan that required the debtor to pay all of the debtor's "actual disposable income" as opposed to "projected disposable income" was confirmable.

Holding: The debtor appealed a "Corrective Order" issued by the Bankruptcy Court for the Middle District of Florida, Fort Myers Division, that confirmed the debtor's Subchapter V plan but with revisions that required the debtor to prepare quarterly monthly reports and pay all of the debtor's "actual disposable income remaining after payment of senior claims; provided, however, if the Debtor's actual disposable income is less than $150.00 in each quarter, the debtor will still distribute $150.00 pro rata to Class 7 unsecured creditors." The Debtor appealed on the grounds that the Bankruptcy Court abused its discretion in issuing the Corrective Order because Code 1191 only requires the plan payments to be based on the debtor's projected disposable income and there

is no requirement under Code 1191 to file monthly reports. On appeal, the District Court affirmed the Corrective Order and found that the Bankruptcy Court has the authority under Code 105 and the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The District Court held that the plan provisions in the Corrective Order "were clearly necessary and appropriate under the facts of this case."

17. *In re HBL SNF LLC*, 635 B.R. 725 (Bankr. S.D.N.Y. 2022)

Issue: Whether the time to file Subchapter V plan should be extended.

Holding: Burden to establish basis for extension of time to file plan under Subchapter V of Chapter 11 is stringent, and a higher standard than the "for cause" standard that governs extensions of time to file a plan in a traditional Chapter 11 case. In this case, debtor, a nursing and rehabilitation facility, satisfied its burden to show that an extension of time was appropriate to file its plan where central issue of lease with landlord remained unresolved and needed to be resolved before any reorganization could occur, and extension would not unduly prejudice any party, including landlord, since lease litigation was, in fact, filed by the landlord and thus the landlord could hardly complain that all parties were taking time in the bankruptcy case to resolve it.

18. *In re Orange County Bail Bonds, Inc.*, 638 B.R. 137 (9th Cir. BAP 2022)

Issue: Whether Subchapter V plan should be confirmed.

Holding: Bankruptcy Court did not clearly err in determining that debtor-bail bond company's plan under Subchapter V of Chapter 11 was fair and equitable, as required for confirmation; even though plan did not provide for payment of debtor's projected disposable income. The effective date payment was greater than debtor's projected disposable income for the minimum three-year period. Perhaps the most compelling grounds for denying a motion to dismiss or convert a Chapter 11 case grounded on bad faith filing is the determination that a reorganization plan qualifies for confirmation, because a debtor's showing that a plan of reorganization is ready for confirmation essentially refutes a contention that the case is filed or prosecuted in bad faith.

19. *In re Double H Transportation, LLC*, 2022 WL 1916686 (W.D. Tex. May 16, 2022)

Issue: Whether Subchapter V plan should be confirmed.

Holding: Where Chapter 11 debtor limited liability company's Subchapter V plan proposed paying unsecured creditors nothing, thereby impairing those creditors' rights, those classes rejected the proposed plan by operation of law under Bankruptcy Code, and therefore Bankruptcy Court could not confirm the plan even if creditors' objections were not properly filed. If Subchapter V plan in Chapter 11 case cannot be confirmed as consensual with respect to impaired classes of creditors, it can only be confirmed if it meets statutory "fair and equitable" requirements.

Bankruptcy Court did not abuse its discretion in determining that Chapter 11 debtor limited liability company's Subchapter V plan was not proposed in good faith. Debtor's original plan proposed full payment to its creditors, but mere months later, its amended plan proposed paying unsecured creditors nothing, and it was not until a hearing that debtor explained that the inconsistency came from a major calculation error in the original plan, and two creditors that were involved in debtor's first Chapter 11 case did not receive notice of the second proceeding and the bankruptcy court expressed concern that other creditors similarly might have been left out of the second case. 11 U.S.C.A. § 1129(a)(3).

Bankruptcy Court did not abuse its discretion in finding "cause" to convert limited liability company's Subchapter V case to Chapter 7 case after debtor failed to obtain timely confirmation of proposed plan. Court only converted the case after finding that debtor had failed to confirm a Chapter 11 plan three times, including once in its original Chapter 11 case and twice in the current case, and the court had no duty to grant debtor a fourth bite at the apple. The court's finding that plan was not proposed in good faith was also grounds for conversion.

20. *In re Excellence 2000, Inc.*, 636 B.R. 475 (Bankr. S.D. Tex. 2022)

Issue: Whether debtor should be allowed to extend deadline for filing a plan when motion was filed one day after the deadline passed.

Holding: Since Code § 1121(e) does not apply in a Subchapter V case, a debtor in a Subchapter V case can seek an extension after the deadline has passed, but in this case the debtor failed to satisfy its burden that the debtor should not justly be held accountable for its failure to meet the deadline as set forth in the following factors established in *In re Baker*, 625 B.R. 27 (Bankr. S.D. Tex. Dec. 21, 2020): (i) whether the circumstances raised by the debtor were within its control, (2) whether the debtor has made progress in drafting a plan, (iii) whether the deficiencies preventing that draft from being filed are reasonable related to the identified circumstances, and (iv) whether any party in interest has moved to dismiss or convert eh debtor's case or otherwise objected to a deadline extension in any way.

21. *In re HBL SNF, LLC*, 635 B.R. 725 (Bankr. S.D.N.Y. 2022)

Issue: Whether the debtor's motion to extend the time to file a plan should be extended.

Holding: Debtor, a nursing and rehabilitation facility, satisfied its burden to show that an extension of time was appropriate to file its plan under Subchapter V of Chapter 11, where central issue of lease with landlord remained unresolved and needed to be resolved before any reorganization could occur, and extension would not unduly prejudice any party, including landlord, since lease litigation was, in fact, filed by the landlord and thus the landlord could hardly complain that all parties were taking time in the bankruptcy case to resolve it. 11 U.S.C.A. § 1189(b).

22. *In re Robinson*, 632 B.R. 208 (Bankr. D. Kan. 2021)

Issue: Whether individual debtor's plan was proposed in good faith.

Holding: (1) Individual debtor's amended Subchapter V plan was proposed in good faith, despite United States Trustee's (UST) objection that debtor had "concealed prolific gambling" pre- and postpetition. Debtor did not conceal his postpetition gambling but revealed it in detail in operating report and agreed to provide additional $4,000 to one class to cover his postpetition gambling loss and to cease gambling while in bankruptcy. Also there was no evidence that debtor underreported his prepetition winnings or overstated his losses on his tax returns or that he secreted winnings that otherwise would have been available to pay creditors under his plan. Debtor's mistakes in reporting gambling winnings and losses on his initial and amended statements of financial affairs (SOFA) did not result in the hiding of any taxable income and were not intended to hide his prepetition gambling, and debtor neither abused the purposes of reorganization nor attempted to frustrate the rights of creditors.

(2) Amended Subchapter V plan of individual Chapter 11 debtor, the manager of a funeral home business, could be confirmed as a consensual plan, even though all classes were impaired and no creditor in any class voted or returned a ballot. Although plan contained no language to the effect that failure to vote would be deemed acceptance of plan, binding circuit precedent recognized that a nonobjecting and nonvoting creditor is deemed to have accepted a Chapter 11 plan, and that precedent applied in this Subchapter V case, such that all of debtor's creditors and all classes of creditors, none of whom voted, objected to confirmation, or appeared at the confirmation hearing, would be deemed to have accepted plan, which would be confirmed as a consensual Subchapter V plan if all other confirmation requirements were satisfied.

23. *In re Gabbidon Builders, LLC*, 2021 WL 1964544 (Bankr. W.D.N.C. May 14, 2021)

Issue: Whether debtor's Subchapter V plan that proposed a sale of property was feasible.

Holding: Debtor presented no evidence to support a conclusion that the sale of the Debtor's property that was critical to make the payments to creditors under the plan was imminent, and thus the Court finds that conversion is in the best interest of creditors so that a Chapter 7 trustee can liquidate the property and distribute the proceeds.

24. *In re U.S.A. Parts Supply, N.D.*, 630 B.R. 487 (Bankr. N.D. W. Vir. 2021)

Issue: Whether debtor's Subchapter V plan was feasible.

Holding: Plan proposed by Chapter 11 debtor, a limited partnership in the business of selling used and antique automotive parts, which had elected to proceed under Subchapter V, was not feasible. The debtor failed to show that its plan, which relied upon the proposed sale and lease-back of its real estate and increased sales expected from upgrading its website, including implementing an online sales portal, was not likely to be followed by liquidation or further reorganization, for the following reasons: (i) debtor used outdated revenue data in projecting its anticipated increased revenue after implementing its new online sales portal, (ii) debtor predicted a 50% increase in sales despite the ongoing COVID-19 pandemic, and (iii) the testimony of debtor's principal regarding the expected increase in sales was anecdotal in nature. Further cause exists to dismiss the case for the following reasons: (i) debtor's principal was unable to explain several ambiguities in debtor's books and records, including an amount itemized in debtor's financial records for "Accounts

Receivable" when debtor, which operated on a cash basis, had no accounts receivable, (ii) debtor had paid prepetition unsecured creditors, including one owned by principal's brother, postpetition, without seeking court approval, (iii) debtor had failed postpetition to file necessary tax returns and to remain current on its obligations for sales and use taxes, (iv) debtor's principal had received a $5,000 loan from a company owned by his wife, without seeking court approval, and (v) debtor had suffered continuing losses in the absence of a reasonable likelihood of rehabilitation.

25. *In re Microcurrent Research and Education, LLC*, 626 B.R. 455 (Bankr. M.D. Fla. 2021)

Issue: Whether debtor's plan should be confirmed when the debtor failed to attach a proper liquidation analysis.

Holding: Failure of debtor to attach a liquidation analysis showing roughly $80,000 to $100,000 in unencumbered cash on hand while proposing a total dividend of $750 to be paid over a period of five years was not in "good faith."

26. *In re Walker*, 628 B.R. 9 (Bankr. E.D. Pa. 2021)

Issue: Whether Subchapter V plan should be confirmed over objection by unsecured creditor.

Holding: Debtor's plan was in "good faith" despite only paying a projected dividend of 7.5% to general unsecured creditors while retaining a large expensive home with carrying costs of roughly $9,000 per month. Plan had overwhelming support of general unsecured creditors of 84.6% of the voting claims.

27. *In re BK Technologies, Inc.*, 2021 WL 1230123 (Bankr. N.D. W. Va. Mar. 30, 2021)

Issue: Whether debtor's Subchapter V plan contains unwarranted releases for non-debtor third parties.

Holding: The Court finds that the Debtor's case was not an honest intent to reorganize or liquidate for the benefit of creditors because the Debtor had prepetition sold its assets and paid creditors and only after being sued by a third party did the Debtor file a plan with nothing to liquidate or reorganize.

28. *In re Adams*, 2021 WL 1783350 (Bankr. M.D. Fla. Mar. 19, 2021)

Issue: Whether debtor should be granted a stay of time to file a third amended plan pending appeal of plan confirmation.

Holding: Motion denied because Subchapter V cases were intended to be an expedited process to allow small business debtors to reorganize quickly, inexpensively, and efficiently and the Debtor's request to extend the case indefinitely pending the outcome of the appeal is not within the spirit of what a Subchapter V case is intended to be.

29. *In re Online King, LLC*, 629 B.R. 340 (Bankr. E.D.N.Y. 2021)

Issue: Whether debtor should be allowed to extend deadline for filing a plan after that deadline had expired.

Holding: Despite no objections to the extension, Debtor failed to satisfy stringent burden of demonstrating that the debtor was entitled to an extension. Excuses offered by debtor such as Jewish holidays and counsel's inability to work over the holidays were insufficient.

30. *In re Bressler*, 625 B.R. 27 (Bankr. S.D. Tex. 2021)

Issue: Whether Debtor satisfied the voting requirements for a Subchapter V plan confirmation.

Holding: Uncontested plan was approved when only one member of a class voted in favor of the plan and all others fail to vote in compliance with Bankr. Rule 3018(c). Query why the Court made an issue of satisfying Code § 1126 when Code § 1191(b) excepts the voting requirements under Code § 1129(a)(8) and (10) when the plan does not discriminate unfairly and is fair and equitable.

31. *In re Baker*, 625 B.R. 27 (Bankr. S.D. Tex. 2020)

Issue: Whether debtor should be allowed to extend deadline for filing a plan.

Holding: Nothing in Code § 1189(b) indicates that Congress intended the 90-day filing deadline to be jurisdictional. The statute does not preclude extending the filing deadline, and in fact is explicitly permissive of such. The plain language of the phrase "attributable to circumstances for which the debtor should not justly be held accountable" evinces a higher standard than the "for cause" standard set forth in both Bankr. Rule 9006(b) (governing extensions of time generally) and Code § 1121(d)(1) (governing extensions of a non-subchapter V debtor's exclusivity period to file a chapter 11 plan). The court finds that the need for an extension for the debtor to file a plan beyond the deadline is attributable to circumstances for which the debtor should not justly be held accountable when the deadline for the filing of government claims had not passed and the death of the debtor's brother and part owner made it difficult for the debtor to propose a plan.

32. *In re Pearl Resources LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020)

Issue: Whether Subchapter V plan should be confirmed.

Holding: While Subchapter V does not affect any change in the unfair discrimination requirement, Code § 1191(c) does provision a new "rule of construction" in Subchapter V cases for the condition that a plan be "fair and equitable," replacing the detailed definition of that term contained in Code § 1129(b). The absolute priority rule has been replaced with the "fair and equitable" requirement to protect dissenting unsecured classes similar to those requirements found in applicable Chapters 12 and 13 cases and individual Chapter 11 cases. The Court finds persuasive testimony supporting the proposition that the development of the Debtor's property will generate income included to determine Disposable Income distributed under the Plan, which will inure for the benefit of the objecting creditors. Further valuation testimony supported Debtors' contention that the Retained

Lien, along with the other protections in the Plan, provide the Objecting Creditors with the indubitable equivalent of their claims, even when viewed through a stringent indubitable equivalent standard. In light of the evidence and testimony discussed herein, the Court finds that Debtors' Plan satisfies § 1129(b)(2)(A).

33. *In re VP Williams Trans, LLC*, 2020 WL 5806507 (Bankr. S.D.N.Y. Sept. 29, 2020)

Issue: When must a 1111(b) election be made in a Subchapter V case?

Holding: Bankr Rule 3014 requires that an 1111(b) election be made before conclusion of the disclosure statement hearing, but under Subchapter V, there is no disclosure statement. In this case, an election under 1111(b) made after the filing of a proof of claim, but before the confirmation of a plan, was timely under Subchapter V.

34. *In re Ellingsworth Residential Community Assoc., Inc.*, 619 B.R. 519 (Bankr. M.D. Fla. 2020)

Issue: Whether debtor's plan was fair and equitable to unsecured creditor.

Holding: In confirming the plan, the court held that "the "fair and equitable" requirement is met if:

- The plan provides that the debtor's projected disposable income received in a three-year period, or such longer period not to exceed five years, is applied to make payments under the plan;
- There is a reasonable likelihood the debtor can make all plan payments; and
- The plan provides remedies to protect the holder of claims or interests.

In this case, the plan is fair and equitable because Debtor is devoting *more* than its projected disposable income, Debtor is proposing a way to maximize payments to its creditors while still paying its on-going expenses, there is a high likelihood the Debtor will make these payments. And, if the payments are not made, the Plan provides adequate remedies to protect creditors' claims.

H. PLAN MODIFICATION

1. *Samurai Martial Sports, Inc.*, 644 B.R. 667 (Bankr. S.D. Tex. 2022)

Issue: Whether debtor should be allowed to modify nonconsensual plan.

Holding: To modify a plan of reorganization under subchapter V of Chapter 11, the plan, as modified, must (1) be warranted under the circumstances, that is, the debtor must show that the circumstances which gave rise to the modification were the result of an unforeseen circumstance that rendered the confirmed plan to be unworkable, and (2) satisfy the confirmation requirements for Subchapter V plans. In a Subchapter V case, in contrast to a Chapter 11 case, a separate disclosure and solicitation of votes is not required. All that is required in a subchapter V plan is

that it contain all of the plan requirements listed in the applicable subsections of the section of the Bankruptcy Code governing contents of subchapter V plans and that debtor solicit ballots for the plan/modification. There is no limitation that a modification take place prior to substantial consummation of the plan. Debtors who undertake, in good faith, reasonable business decisions that ultimately render their Chapter 11 plan unworkable should not automatically be precluded from modification even if the results of their decisions were foreseeable as a possible outcome. In other words, a debtor's good faith and business judgment are relevant when considering if circumstances are unforeseeable.

Although subchapter V offers debtors significant flexibility by eliminating the requirement that at least one creditor approve a plan, such flexibility is not without limits, and a debtor must still solicit ballots even if it is anticipated that all creditors will vote for or against the plan/modification. Also, although a Subchapter V debtor's failure to make a good faith effort to solicit ballots is a ground for denying confirmation of a nonconsensual plan, cramdown confirmation of a plan with balloting that draws no objections or that is modified to resolve them by agreement, creating what is essentially a consensual cramdown plan, is perfectly acceptable in a Subchapter V confirmation proceeding.

In this case, the modification of confirmed nonconsensual plan of reorganization of Subchapter V debtor, the owner of a fitness facility, by temporarily deferring three months of plan payments was not "warranted under the circumstances," that is, on basis that two air conditioning units stopped working and needed to be replaced, which caused decline in business and thus revenue due to the extremely hot facility. Debtor, in anticipation of possible sale of the property, intentionally failed to make the first of the required plan payments that it now sought to cure through plan modification, thus exhibiting bad faith and poor business judgment. Debtor inexplicably failed to escrow for the emergency reserve fund contemplated by its confirmed plan, and debtor did not show that its failure to make second and third plan payments was due to unforeseen circumstances rendering the plan unworkable, given, inter alia, that its actual revenue suggested that it was capable of making those payments in full. Further debtor failed to show that proposed modification satisfied the confirmation requirements for Subchapter V plans, in particular, the requirement that the proponent of the plan comply with the applicable provisions of Title 11. Debtor failed to offer and admit an updated liquidation analysis into evidence at the hearing on its motion to modify. Also debtor's modified projections of future revenue did not include actual revenue streams for months that had already passed or several line-item expenditures necessary to assess payment feasibility, and debtor failed to solicit ballots.

I. POST-CONFIRMATION

1. *In re AP Framing, Inc.*, 669 B.R. 894 (Bankr. N.D. Ga. 2025)

Issue: Whether Subchapter V case should be reopened in order to modify plan injunction.

Holding: Reopening debtor's Subchapter V Chapter 11 case was appropriate for creditor to pursue state court litigation nominally against debtor to obtain recovery against any applicable insurance, given that neither debtor nor other creditors would be prejudiced, whereas creditor would suffer substantial prejudice if not allowed to pursue the litigation to conclusion because creditor would

recover nothing under debtor's plan on account of its unliquidated claim, and allowing creditor to continue its suit did not rise to the level of a prohibited modification of the plan injunction. There was no evidence that debtor would bear material litigation expenses, and, in any event, creditor seeking relief to collect against insurance could not collect against debtor personally or from its assets.

2. *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 (Bankr. D. Puerto Rico, April 25, 2022)

Issue: Whether a Subchapter V case can be "administratively closed" during the term of the debtor's plan.

Holding: The Court finds that the Debtor's argument for requesting the "administrative closing" of the Chapter 11 subchapter V case which is based on reducing the costs of the administration of the case are unfounded. Subchapter V debtors are specifically exempted under 28 U.S.C. § 1930(a)(6)(A) & (B) from having to pay quarterly fees to the U.S. Trustee. In addition, Subchapter V debtors' obligation to file monthly operating reports terminated on the effective date of the plan pursuant to Bankr. Rule 2015(6). Unlike, individual Chapter 11 cases, in which a final decree is entered, and thereafter the case is administratively closed and subsequently reopened, in Chapter 11 Subchapter V cases that are confirmed under 11 U.S.C. § 1191(b), the services of the Subchapter V trustee do not terminate until the completion of plan payments and the subchapter V trustee files his/her final report and the debtor then requests the entry of final decree and discharge. Thus, the fact that the Subchapter V trustee is not discharged until he or she has filed the final report contravenes the language in 11 U.S.C. § 350(a) which provides that, "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case."

J. DISCHARGE

1. *In re 2 Monkey Trading, LLC*, 142 F.4th 1323 (11th Cir. 2025)

Issue: Whether the non-dischargeability provisions under Code § 523 apply to Subchapter V debtor corporations.

Holding: Abrogating *In re Hall*, "§ 1192's plain text is unambiguous—§ 1192"s discharge exception applies to both corporate and individual debtors".

2. *In re ETG Fire, LLC*, 670 B.R. 884 (Bankr. D. Colo. 2025)

Issue: Whether the non-dischargeability provisions under Code § 523 apply to Subchapter V debtor corporations.

Holding: The Bankruptcy Code's nondischargeability provisions in Code § 523 apply to debts of corporate debtors in Subchapter V cases where the proposed reorganization is nonconsensual under Code § 1191(b). Although the preamble of Code § 523 limits the discharge exceptions to individual debtors, Code § 1192(2) makes no distinction between individual and corporate debtors

and, as the more specific section, this provision controls. It is not the bankruptcy court's place to second guess Congress or to construe the Bankruptcy Code so as to impose policies which the court might prefer but which Congress did not adopt. In this case, a corporate debtor's intent may be established, for purposes of the discharge exception for debts for willful and malicious injury, by imputing to the debtor the acts and intentions of its management and senior employees, acting within the scope of such agents' employment, in the debtor's interest. Additionally, the operator of a fire safety and protection business and its wholly-owned subsidiary, adequately alleged the intent of Chapter 11 Subchapter V debtor, that was a competing fire protection company, as opposed to merely the intent of debtor's management and employees, to cause "willful and malicious injury" to creditors, as required to state a claim for relief under the dischargeability exception, by alleging that debtor's executives and officers, as well as several senior employees, acting in the scope of their employment and with knowledge of creditors' rights, engaged in numerous shenanigans violative of such rights, including that they knowingly encouraged, aided, abetted, and participated in a scheme to divert creditors' customers to debtor and to use creditors' propriety and confidential information and trade secrets for the benefit of debtor to the detriment of creditors' business.

3. *In re Carolina Sleep Shoppe, LLC*, 670 B.R. 764 (Bankr. W.D.N.C. 2025)

Issue: Whether the Court should enter a final decree in Subchapter V case prior to discharge.

Holding: A case initiated under Subchapter V of Chapter 11 may be closed prior to entry of discharge where the debtor's plan was non-consensually confirmed if the Bankruptcy Court finds that the requirements have been satisfied requiring closure of cases after full administration of the estate and discharge of the trustee. In this case, a final decree should be entered discharging the Subchapter V trustee because the requirements of Code 350 had been satisfied including the following: (i) The estate was fully administered, for purposes of the bankruptcy rule directing the bankruptcy court to enter a final decree closing debtor's case under Subchapter V of Chapter 11 after full administration of the estate; (ii) the order confirming the non-consensual plan had become final, (iii) the plan did not require for any deposits to be distributed, (iv) the plan as confirmed provided that property of the estate vested in the reorganized debtor upon plan confirmation, (v) the debtor operated the business and managed the property dealt with by the plan, (vi) the debtor had begun making payments under the plan, and (vii) other than the current motion to close the case, all motions, contested matters, and adversary proceedings had been resolved.

4. *In re GFS Indus., L.L.C.*, 99 F.4th 223 (5th Cir. 2024).

Issue: Whether the non-dischargeability provisions under Code § 523 apply to Subchapter V debtor corporations.

Holding: Because Congress did not add a provision to Code § 1192(2) instructing that the list of nondischargeable debts was limited to only certain types of debtors—entities or individuals—the words of Subchapter V are clear, and therefore there is no need to revert to policy issues or speculation as to what Congress must have meant. The specific language of Code § 1192(2) refers only to types of debts, not types of debtors. "Just like section 1228, section 1192 clearly contains language that lists claims that are not subject to discharge under those portions of the statute.

Generally, two sections of the Code with identical language should be interpreted with the same meaning."

5. *In re Cleary Packaging, LLC*, 36 F.4th 509 (4th Cir. 2022)

Issue: Whether the non-dischargeability provisions under §523 apply to Subchapter V debtor corporations.

Holding: Code § 1192(2) provides discharges to small business debtors, whether they are individuals or corporation. This section excepts from discharge "any debt …of the kind specified in section 523(a)" and thus focuses on the kind of debt and not the kind of debtor, such as an individual. Further the context of Code § 1192(2) within the structure of the Bankruptcy Code further supports this interpretation through the elimination of different provisions provided to different kinds of debtors. Congress enacted Subchapter V with the primary goal of simplifying Chapter 11 reorganizations for small businesses, including individuals, and reducing the administrative costs for those businesses. By eliminating the absolute priority rule and the applicability of § 1141(d) to Subchapter V cases, Congress eliminated distinctions in Chapter 11 discharges that exist between individual and corporate debtors. An important purpose of Subchapter V would be frustrated if the court treated individuals and corporation discharges differently for exceptions to discharges under Code § 523(a).

6. *In re Hall*, 651 B.R. 62 (Bankr. M.D. Fla. 2023)

Issue: Whether the non-dischargeability provisions under §523 apply to Subchapter V debtor corporations.

Holding: Exceptions to discharge under Code § 523 do not apply to corporate Subchapter V debtors because the specific language in Code § 523(a) controls over the more general language within Code § 1192).

7. *In re Premier Glass Services, Inc.*, 2024 WL 3808696 (Bankr. N.D. Ill. August 13, 2024).

Issue: Whether individual debtor was entitled to a discharge upon a liquidation.

Holding: Plaintiff believes that confirmation of a consensual plan is not likely and has filed the adversary case to determine whether the debts of the kind listed in Code § 523(a) apply to a Subchapter V entity debtor. The court denied the motion to dismiss, holding that the complaint states a claim upon which relief can be granted because claims of the kind listed in Code § 523(a) are not dischargeable under Code § 1192(2) for entity and individual debtors.

8. *In re Lucido*, 655 B.R. 355 (Bankr. N.D. Calif. 2023)

Issue: Whether individual debtor was entitled to a discharge upon a liquidation.

Holding: Debtor's proposed Subchapter V Chapter 11 plan provided for liquidation of "substantially all" of the property of the estate and so was a liquidating plan for purposes of Code § 1141(d)(3)(B) providing that confirmation of Chapter 11 liquidation plan does not discharge a debtor if debtor does not engage in business after consummation of plan and debtor would be denied discharge if case were one under Chapter 7. Nevertheless, post-petition tax documents and debtor's Chapter 11 monthly operating reports disclose that his consulting work generated the bulk of his (non-rental) post-petition income, and the Plan proposes that Lucido will expand his consulting business, continue to work out of the union hall, and start to receive social security. Further, there is no strong indication that his consulting business will slacken post-consummation, and the fact that this work will not be the sole source of funds does not prevent this court from determining that he will be "engaging in business." Accordingly, the court finds that the objecting creditor has not met its burden of proof on whether the debtor would be engaged in business post-confirmation and thus the debtor would be entitle to a discharge. The court did not address whether Code § 1141(d)(3) applies in a Subchapter V case when Code §1181(c) states that Code § 1141(d) does not apply when the plan is confirmed under § 1191(b).

Additionally, denial of the discharge of Subchapter V Chapter 11 debtor was not warranted on the ground that he fraudulently transferred, removed, destroyed, mutilated, or concealed estate property postpetition; although claimant argued that debtor concealed evidence concerning operations and finances of his wholly-owned equipment-rental company, including copies of company's checks. While debtor's equity interest in company was property of the estate, claimant failed to show that debtor's alleged use of company's cash for personal expenses eroded company's equity, and claimant also failed to establish that debtor, who produced company's bank statements and general ledgers, acted with the requisite intent to hinder, delay, or defraud.

9. *In re Off-Spec Solutions, LLC*, 651 B.R. 862 (9th Cir. BAP 2023)

Issue: Whether the non-dischargeability provisions under §523 apply to Subchapter V debtor corporations.

Holding: Code §1192 renders dischargeable debts that would be nondischargeable for individuals.

10. *In re 2 Monkey Trading, LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023)

Issue: Whether the non-dischargeability provisions under §523 apply to Subchapter V debtor limited liability companies.

Holding: Discharge exceptions does not apply in Subchapter V cases filed by limited liability companies.

11. *In re GFS Industries, LLC*, 647 B.R. 337 (Bankr. W.D. Tex. 2022)

Issue: Whether the non-dischargeability provisions under §523 apply to Subchapter V debtor corporations.

Holding: Exceptions to discharge in bankruptcy applied to discharge under Subchapter V, but only as to individual debtors. 11 U.S.C.A. §§ 523(a)(2)(A). "In the Court's judgment, however, the preamble to § 523(a) is critical to the analysis. Importantly, § 523(a) contains limiting language, stating that "[a] discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an *individual* debtor from any debt..." (emphasis added). However, conduct that would deny a debtor's discharge under Chapter 7 is incorporated into Chapter 11 cases; therefore, a court may treat a Subchapter V case as if it were a Chapter 7 case and measure the debtor's conduct against the list of nondischargeable actions under Chapter 7.

12. *In re Rtech Fabrications, LLC*, 635 B.R. 559 (Bankr. D. Idaho 2021)

Issue: Whether limited liability company in Subchapter V case was subject to section 523 as a non-individual.

Holding: When considering the plain language of § 523(a) and § 1192, as well as the history of the corporate discharge and overall statutory scheme of Chapter 11, the Court found that § 523(a)'s discharge exceptions only apply to an individual debtor and § 1192(2)'s reference to § 523(a) does not expand its applicability to entity debtors.

13. *In re Satellite Restaurants Inc. Crabcake Factory USA*, 626 B.R. 871 (Bankr. D. Md. 2021)

Issue: Whether non-dischargeability provisions apply to Subchapter V debtor corporations.

Holding: Despite section 1192, which excepts "any debt that is otherwise nondischargeable", the non-dischargeability provisions do not apply to Subchapter V corporations because the non-dischargeability provisions under Code § 523 only apply to individuals and Congress did not clearly intend to change that result in Subchapter V. The court specifically disagreed with 5 *Norton Bankr. L. & Prac*. § 107:19 (3rd ed. 2021). *Accord In re Cleary Packaging LLC*, 2021 WL 2667735 (Bankr. D. Md. 2021) rev. 36 F.4th 509 (4th Cir. June 7, 2022).

K. REMOVAL OF THE DEBTOR AS DEBTOR IN POSSESSION

1. *In re Athena Medical Group, LLC*, 2025 WL 2125130 (Bankr. D. Ariz. July 29, 2025)

Issue: Whether counsel for Subchapter V debtor who was removed as a debtor in possession can seek compensation from the estate.

Holding: Counsel for dispossessed subchapter V debtor-in-possession (DIP) may not recover from the estate its fees and costs incurred in pursuing a plan of reorganization, or for performing other

work. Similar to traditional Chapter 11s, a DIP who, once dispossessed, no longer functions as trustee and so has no ability to hire counsel. The authority of Subchapter V debtor to seek estate funds to pay its counsel is derived from its status as DIP and the fact that Subchapter V debtor is only party who can file a plan does not imply that it may hire counsel to do so with estate funds. Nowhere does the Bankruptcy Code give dispossessed Subchapter V DIP that right, for purpose of filing a plan or otherwise. Counsel's original retention does not survive termination of debtor's DIP status, and even if counsel obtains successful plan confirmation, allowing fees as "actual and necessary costs" of preserving estate would improperly circumvent more specific Code sections. The key to employment under Code § 327 is employment by the trustee, whether that person is hired as an attorney or another professional person.

2. ***In re Duling Sons, Inc.*** **650 B.R. 578 (Bankr. S.D. 2023)**

Issue: Whether debtor should be removed as a Subchapter V debtor in possession.

Holding: "Cause" existed to dismiss or convert corporate debtor's Subchapter V Chapter 11 case to one under Chapter 7, or to remove the debtor-in-possession (DIP), where case had been pending for 16 months, administrative expenses and interest due to an oversecured lender were accruing and posed a threat to the administrative solvency of the case. Notwithstanding the presence of experienced professionals and extensive legal work in the case, the DIP made scant progress in securing the support of creditors for a plan of reorganization, and every major stakeholder had serious concerns about the existence of conflicts of interest and the DIP's ability to act as a fiduciary for debtor's bankruptcy estate. After finding that "cause" exists for dismissal or conversion of Chapter 11 case or removal of debtor-in-possession, the court must decide what course of action will serve the best interests of creditors and the estate. Removing debtor-in-possession and expanding role of Subchapter V trustee, rather than conversion or dismissal of case, was in best interests of creditors and estate, upon finding "cause". There were many advantages to maintaining debtor's Subchapter V election, including its cost-effectiveness and elimination of absolute priority rule. Because debtor intended to market and sell its assets to fund a liquidating plan, staying in Subchapter V would prevent the estate from incurring substantial fees, and as the case had well over 300 docket entries and the estate had made a significant investment in the professionals who were familiar with the case, the natural learning curve for a new professional, if the case were converted, would require duplicative work and further delay distributions to creditors.

3. ***In re Comedymx, LLC*****, 647 B.R. 457 (Bankr. Del. 2022)**

Issue: Whether debtor should be removed as a Subchapter V debtor in possession.

Holding: In a case filed under Subchapter V, a bankruptcy court may remove the debtor from possession on a showing of cause, in which case the Subchapter V trustee is empowered to operate the debtor's business, but, unlike a regular Chapter 11 trustee, this action does not permit any party other than the debtor to propose a plan. Further, a creditor may not circumvent the standards for conversion from one chapter to another by moving to amend the bankruptcy petition. Any authority under Bankruptcy Code to override debtor's judgment to proceed under Subchapter V had to be exercised only as last resort where no other mechanism was available to achieve

objectives of Chapter 11. In this case, the court finds that the owner of debtor-in-possession and its only officer and employee was poorly suited to fulfill statutory obligation of managing Chapter 11 debtor's business as fiduciary to estate and its stakeholders, and therefore cause existed for debtor to not be a Subchapter V debtor-in-possession, since owner threatened to destroy debtor's business for purpose of harming its creditors. There was no way to stop owner from making good on his threats, he boasted that he did not "give a damn about the law," and he was in open defiance of related injunctions entered by state court. Therefore, the motion to change the Subchapter V designation is denied, but the US Trustee's motion to remove the debtor in possession under § 1185 is granted.

4. ***In re Corinthian Communications, Inc.*, 642 B.R. 224 (Bankr. S.D.N.Y. 2022)**

Issue: Whether US Trustee's motion to remove principal as debtor in possession of Subchapter V sub S corporation should be granted.

Holding: Subchapter V of the Bankruptcy Code provides the Court the alternative to removing the debtor as debtor in possession, namely expanding the powers of the Subchapter V Trustee to investigate the affairs of the debtor and to report to the Court. A court may sua sponte issue an order expanding the duties a Chapter 11 Subchapter V trustee, even though the governing subsection contains the phrase "on request of a party in interest." In this case cause existed to expand duties of Subchapter V trustee for Chapter 11 debtor S corporation to investigate affairs of debtor and to report to bankruptcy court, since lack of any intercompany agreement between debtor and its affiliates regarding shared liabilities or monthly flow of funds from affiliates to debtor, including bookkeeping and payroll, raised substantial issue whether debtor had intercompany claims against affiliates or vice versa. There was a question whether principal would assert claim against debtor and, if so, whether there was any basis for such claim, and debtor's disclosure to Subchapter V Trustee continued to be lacking.

5. ***In re Pittner*, 638 B.R. 255 (Bankr. D. Mass. 2022)**

Issue: Whether "cause" existed under 11 U.S.C. § 1185(a) to remove debtor as debtor in possession.

Holding: Bankruptcy Court would remove debtor from possession, instead of dismissing or converting case under Subchapter V of Chapter 11 to Chapter 7, upon finding "cause". The resulting increase in the powers and duties of the Subchapter V trustee was in the best interests of creditors and the estate and better served those interests than either conversion or dismissal, which would likely provide no recovery to unsecured creditors and would likely result in nothing but another bankruptcy filing by debtor, which would be a sixth case.

6. ***In re Young*, 2021 WL 1191621, at *1 (Bankr. D.N.M. Mar. 26, 2021)**

Issue: Whether "cause" existed under 11 U.S.C. § 1185(a) to remove the debtors from possession.

Holding: The Court concluded that "cause" existed to convert the case or remove the debtors from possession. Given that creditors would be better served by keeping the case in a chapter 11 and removing the debtors from possession, the Court granted the request of the Subchapter V trustee who was advocating removal per § 1185(a).

7. *In re Neosho Concrete Prod. Co.*, 2021 WL 1821444t *7 (Bankr. W.D. Mo. May 6, 2021)

Issue: Whether "cause" existed under 11 U.S.C. § 1185(a) to remove the debtor from possession

Holding: While "cause" existed at the time the UST filed the motion, the debtor had remedied the situation by the time it was heard. The Court found that Neosho had competently managed the bankruptcy estate and adapted to challenges as it encountered them. Moreover, the debtor intended to reimburse the estate for the value of its alleged preferential transfers and prioritized the debtor's interests above individual interests. Ultimately, weighing multiple factors and conducting a costs v. benefits analysis, the Court held that cause no longer exists to remove Neosho as debtor in possession.

MID-SOUTH COMMERCIAL LAW INSTITUTE

NASHVILLE, TENNESSEE

December 4, 2025

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2025

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I. Attachment of Security Interest

A. *In re Genesis Global Holdco LLC*, 658 B.R. 31 (Bankr. S.D.N.Y. 2024)

The debtors in bankruptcy are multiple companies owned by a parent in the crypto business. The secured creditor, a crypto currency platform that acted as an agent for lenders of digital assets to entities including debtors, filed an adversary proceeding to foreclose on certain collateral debtors purportedly pledged. The subject security agreement included a detailed description of the collateral that was "all property from time to time transferred by or on behalf of [the debtor] to or for the benefit of [the secured party]," and was later amended to provide that the debtor's remote parent would transfer 31,180,804 additional shares of stock to the debtor, which the debtor promptly thereafter "shall transfer or cause to be transferred" to the secured party. Despite the remote parent not transferring the second tranche of shares, the secured creditor claimed a right to foreclose. Applying rules of contract construction, the Court found the additional shares could not have been pledged without the transfer and thus they were not collateral available to the secured creditor.

B. *AVT Texas, L.P. v. Sarbali Alloys, LLC*, 2024 WL 4666331 (D. Utah 2024)

The Third Circuit affirmed that John Lane lacked a security interest in settlement proceeds from Main Street Business Funding, LLC's "Embezzlement Litigation," despite a sweeping security agreement covering all present and after-acquired property and proceeds. Focusing on Article 9 and Pennsylvania's "gist of the action" doctrine, the court held the Embezzlement Litigation, viewed as a whole, was a commercial tort claim. Under UCC §§ 9-108(e)(1) and 9-203, such claims must be described with sufficient particularity; generic, catch-all language is inadequate. Because the agreement did not mention the Embezzlement Litigation or otherwise identify tort claims with specificity, it did not encumber the lawsuit or its settlement. The court further held that UCC § 9-204(b)(2) bars after-acquired clauses from attaching to commercial tort claims, reinforced by comment 4's requirement that the claim exist when the agreement is authenticated. Lane's proceeds theory also failed: he argued the settlement funds were proceeds of collateral—the embezzled cash—but a debtor cannot grant a security interest in property in which it has no rights, and the funds were stolen before the agreement. Without an underlying security interest in the stolen money, the litigation could not constitute proceeds of collateral. The court rejected Lane's "gist of the settlement" argument. The decision underscores that creditors must specifically describe commercial tort claims and cannot rely on after-acquired or proceeds provisions to capture them post hoc.

C. *In re Main Street Business Funding, LLC*, 2024 WL 4056601 (3d Cir. 2024)

The Third Circuit affirmed that John Lane lacked a security interest in settlement proceeds from Main Street Business Funding, LLC's "Embezzlement Litigation," despite a sweeping security agreement covering all present and after-acquired property and proceeds. Focusing on Article 9 and Pennsylvania's gist-of-the-action doctrine, the court held the Embezzlement Litigation, viewed as a whole, was a commercial tort claim. Under UCC §§ 9-108(e)(1) and 9-203, commercial tort claims must be described with sufficient particularity; generic, catch-all language is inadequate. Because the agreement did not mention the Embezzlement Litigation or otherwise identify tort claims with specificity, it did not encumber the lawsuit or its settlement. The court further held that UCC § 9-204(b)(2) bars after-acquired clauses from attaching to commercial tort claims, reinforced by comment 4's requirement that the claim

exist when the agreement is authenticated. Lane's proceeds theory also failed: he argued the settlement funds were proceeds of collateral—the embezzled cash—but a debtor cannot grant a security interest in property in which it has no rights, and the funds were stolen before the agreement. Without an underlying security interest in the stolen money, the litigation could not constitute proceeds of collateral. The court rejected Lane's "gist of the settlement" argument. The decision underscores that creditors must specifically describe commercial tort claims and cannot rely on after-acquired or proceeds provisions to capture them *post hoc*.

D. *Green Leaf Farms Holdings LLC v. Belmont NLV, LLC*, 549 P.3d 1199, 2024 WL 2990636 (Nev. 2024)

Debtor held cannabis licenses issued by the state of Nevada and rented property for its operations from landlord/secured creditor. To secure the rent, debtor gave secured creditor a security interest in its cannabis licenses, "subject to approval of regulatory authorities." When landlord declared default and terminated the lease, debtor sued to enforce a purchase option. Landlord also sued claiming damages and seeking other relief. During the proceedings, debtor asserted that the security agreement for the cannabis licenses violated Nevada law and were therefore void because the license is a revocable privilege in which the holder has no vested right. The Court found, however, that the licensee has a property interest in the license, which may be assigned or sold, even though subject to regulatory approval.

II. Perfection and Priority of Security Interest

A. *Hernandez v. Alaska*, 2024 WL 5154512 (Alaska 2024)

Defendant was an inmate in an Alaskan correctional facility where he asserted he was a "sovereign citizen" who believing governmental authority is generally unlawful except in certain consensual transactions. As such, he made several requests for proof of authority from the Alaskan governor and other current and formal political officials and receiving no response, Defendant filed UCC financing statements asserting he was owed $42.5 billion and seeking to garnish the wages of the officials. The officials filed a complaint alleging the UCC financing statements constituted nonconsensual common law liens. The court decided the matter on summary judgment, declaring the UCC financing statements invalid, awarding the officials attorney's fees and enjoining the Defendant from enforcing the invalid UCC financing statements or filing future UCC financing statements or other liens. On appeal, the grant of summary judgment was affirmed by the Alaska Supreme Court.

B. *In re K&L Trailer Leasing, Inc.*, 655 B.R. 364 (Bankr. E.D. Tenn 2024)

Bank #1 made a floor plan line of credit available to a seller of big rig trailers ("Sales"). Sales granted Bank #1 a security interest in substantially all of its assets, including all owned and after acquired inventory and a UCC financing statement was filed. The loan documents included a covenant prohibiting the sale or assignment of collateral without the written consent of Bank #1 (other than the sale of inventory in the ordinary course of business). An agreement was later reached by Sales to sell 10 trailers to its affiliate leasing company ("Leasing") and the transfers were made by the one owner of both businesses. To finance the purchase, Leasing obtained two secured loans from Bank #2 had the bank lien was noted on the trailer titles. Bank #1 was not provided with notice of the sale and did not consent to the release of its lien. Bank #2 then asserted its priority in the trailers pointing to its notation as lienholder on the

title. While the bankruptcy court agreed both banks had perfected liens, it found that Bank #1 had priority. The court noted that by virtue of their common owner, both Sales and Leasing were aware that the transfer violated Bank #1's covenants and therefore Leasing was not a buyer in the ordinary course. Without the release by Bank #1, its security interest in the collateral continued and Bank #1 maintained its priority lien in the trailers.

C. *North Star IP Holdings, LLC v. Icon Trade Services, LLC*, 710 F. Supp. 3d 183 (S.D.N.Y. 2024)

The Southern District of New York held that North Star acquired the Rebecca Minkoff trademarks and associated goodwill through a commercially reasonable Article 9 disposition, and as a good-faith transferee under UCC § 9-617(b) took the collateral free and clear of subordinate interests, including Icon's rights under its sublicenses. Central to the holding was the characterization of Icon's agreements as exclusive licenses. Because they were exclusive, the UCC's safe harbor for licensees in the ordinary course under § 9-321(b) did not apply, leaving Icon's interests vulnerable to extinguishment upon foreclosure. The court further found no triable issue that North Star acted without honesty in fact or outside reasonable commercial standards in the sale process, rejecting allegations of collusion. Successor liability theories could not revive Icon's extinguished rights because the transaction was a secured-party sale of assets, not an assumption of liabilities.

D. *First Financial Bank v. Tailored Fund Cap, LL*C, 256 N.E.3d 744 (Ohio Ct. App. 2024)

The Ohio First District Court of Appeals reversed a conversion judgment against a merchant cash advance company and ordered dismissal, holding that Article 9 of the Uniform Commercial Code, as enacted in R.C. 1309.332(B), bars recovery by a secured lender where funds subject to its security interest are transferred through a deposit account to a non-colluding transferee. Emphasizing transactional finality and the free flow of funds, the court aligned with the majority view that a transferee of funds from a deposit account takes the funds free and clear of a security interest absent collusion, and that this "washing" applies to the funds themselves, not merely the deposit account. The court underscored that security interests in deposit accounts are inherently less secure than other collateral types under the UCC's policy choices.

III. Enforcement of Security Interest

A. *Landmark Credit Union v. Burnidge*, 2024 IL App (2d) 240123-U, 2024 WL 461855 (Ill. Ct. App. 2024)

Secured creditor was selling collateral (used Subaru Impreza) after repossession based upon breach of the loan agreement. In advance of the sale secured creditor sent debtor a notice of the sale and his rights of redemption. The notification stated both "[i]f you do not redeem the collateral. . . within [21] days from the date of mailing of this notice, the Collateral will be sold," and"[y]ou may redeem the [Collateral] at any time before it is sold." This satisfied the requirements of § 9-614 by advising the debtor that there would be a sale no sooner than 21 days after the date of the notification and that the debtor could redeem the collateral any time before a sale took place. Although the Court upheld the sale notice as complying with § 9-614,

it is noted that there would not have been a question as to adequacy if the secured creditor had used the form in that rule.

B. *CCO Condo Portfolio (AZ) Junior Mezzanine, LLC v. Feldman*, 717 F. Supp. 3d 331 (S.D.N.Y. 2024)

The guarantors of four loans secured by the equity in LLCs that owned four New York condominiums were liable for the full amount of the deficiency owing after the collateral was sold for $65 million at a public sale. The sale was reset several times because of attempts by the debtor to stop it, but it was eventually held on January 7, 2021. It was marketed between December 11 and 29, with a "teaser" notice sent to 31,000 contacts and advertisements running with ads in the New York Times and New York Post. The Court found the sale was conducted in a commercially reasonable manner even though it was advertised during the winter holiday season and held shortly after the new year during the COVID-19 pandemic. The Court relied, in part, on the fact that 170 potential bidders executed the nondisclosure agreement required to access the data room, 97 entered the data room, and 88 downloaded the due diligence materials. It further found that the $500,000 deposit to bid was reasonable as was the requirement that the winning bidder pay a deposit of 5% of the winning bid. The term authorizing the secured party to designate a back-up high bidder if the high bidder failed to close also did not make the sale commercially unreasonable. Other factors included the option for bidders to bid on the four properties individually or as a package.

C. *Buckman v. Heartland Credit Corp.*, 2024 WL 3835486 (W.D. Ky. 2024)

Debtor purchased a motor vehicle financed by Creditor and Debtor provided Creditor with a security interest in the vehicle. Creditor later repossessed that vehicle with Debtor's consent. In reviewing his credit report, Debtor discovered inaccurate information related to the Creditor's listing. Debtor disputed the inaccuracy and requested a complete billing history relating to the account which was not received. Debtor then filed suit and was awarded a default judgment in the amount of $500 under for Creditor's failure to comply with Debtor's request for accounting as required by the UCC.

D. Kamath v Itria Ventures, LLC, 2024 WL 3408218 (N.D. Cal. 2024) *Kamath v Itria Ventures, LLC*, 2024 WL 590603 (N.D. Cal. 2024)

Plaintiff entered into a receivable sales agreement arrangement with Defendant where Plaintiff would sell receivables to Defendant for a cash payment based on some factor of the value of the receivables. However, the funding was conditioned on a due diligence review of the receivables and was to only be advanced at Defendant's "sole discretion." The receivable sales agreement also provided Plaintiff's authorization for the filing of a UCC financing statement and Defendant filed. Upon review of the diligence, the Defendant's offer was less than the Plaintiff expected, and Plaintiff declined to sell the receivables. Upon Plaintiff's request, the UCC financing statement was terminated. Plaintiff then filed suit alleging among other things, breach of contract, fraud, false advertising, breach of fiduciary duty, filing a fraudulent lien, and defamation. In examining the claim of filing a fraudulent lien and UCC filing, the court noted that the receivable sales agreement expressly authorized the UCC filing and Defendants promptly provided the termination. The court also noted that the filing of the UCC financing statement upon authorization did not defame Plaintiff.

E. *Stuff Electronics (Dong Guan) Ltd. v. For Your Ease Only, Inc.*, 2024 WL 3694593 (E.D. Pa. 2024)

In a dispute over QVC sale proceeds for mobile phone chargers, the court's commercial-law focus was Juno Financial's role as Thinium's secured assignee and the consequences of its conduct under UCC Article 9. Although Juno sent FYEO a 2017 notice of assignment directing payments to Juno under § 9-406, the court found that Juno waived any right to the June 2019 receivables by repeatedly encouraging and acquiescing in FYEO's payment flow to Stuff in late-2018 and 2019, including approval of purchase orders that expressly assigned the receivables "ONLY TO Stuff" and a 30% deposit wired to Stuff. Having led participants to rely on this arrangement so that manufacturing and shipments would proceed, Juno could not retract its waiver once Stuff materially changed position, which would be an inequitably late assertion of § 9-406 rights. As a result, Juno's contract claim against FYEO failed, as did its tortious-interference claim (no purposeful inducement) and restitution theories (given Juno's secured advances and no unjust enrichment). The court also held that FYEO's incorporation of the assignment instructions created an enforceable obligation to Stuff as third-party beneficiary, that FYEO breached by withholding roughly $453,000, and that the retained funds must be paid to Stuff.

F. *Quigg v. Saleem*, 2024 WL 3564868 (Ill. Ct. App. 2024)

The Illinois Appellate Court addressed a dispute arising from a leveraged stock sale in which the buyer pledged all corporate shares as collateral and executed cross-defaulting notes and pledge agreements. The court affirmed summary judgment that the buyer defaulted under the sale documents by taking unauthorized cash distributions that breached covenants in the company's senior line of credit, triggering a cross-default under the pledge agreements after proper notice and failure to cure. Emphasizing Article 9 of the UCC, the court reversed the trial court's ruling that the seller automatically became the owner of the pledged shares upon default, holding that "strict foreclosure" requires compliance with UCC § 9-620, including the debtor's post-default authenticated consent or a written proposal without objection, which cannot be waived or varied by agreement. The court construed the parties' "immediate vesting" clause as granting the secured party expansive rights to use and control the collateral under § 9-207 to preserve value, but not outright ownership absent § 9-620 compliance. The seller could continue operating the company and exercise voting and dividend rights consistent with the pledge, while ownership remains with the debtor until a commercially reasonable disposition under § 9-610 or a compliant acceptance under § 9-620.

G. *JPMorgan Chase Bank v. 29-33 Ninth Avenue, LLC*, 710 F. Supp 3d 259 (S.D.N.Y. 2024)

A business became subject to a dispute among the business partners. The business itself was named as the account holder for 10 deposit accounts maintained with a depository bank. One partner in the business sent a letter to the depository bank directing it to only take orders from a list of individuals that differed from the list previously provided in the account agreement. Given the conflict, the depository bank froze the accounts and brought an interpleader action. In an effort to gain control over the accounts, one of the partners asserted they had a perfected first priority security interest in the deposit accounts that should take priority over any other creditors. After reminding the partner that "control" is required to perfect a security interest in a deposit account, it ticked through the elements. Rejecting the assertion that the partner had

a perfected security interest, the judge noted that (i) the partner was not the depository bank where the accounts were maintained, (ii) the partner's letter to the depository bank was only signed by the partner and was not an authenticated record signed by the partner, the account holder, and the depository bank and (iii) the accounts were in the name of the business and therefor partner ha had not become a customer of the bank.

H. *Shinsho American Corp. v. TransPecos Banks*, 2024 WL 3738476 (5th Cir. 2024)

To finance its operations, Debtor obtained two loans from Creditor that were secured by a deed of trust and "all assets," including inventory and the proceeds thereof. Creditor permitted the sale of inventory, recognizing the Creditor's use of the proceeds to invest in the business was essential for ongoing operations. In addition, one of the loans was a U.S. Small Business Association loan and in keeping with those requirements, Creditor did not require Debtor to use the proceeds from the sale of inventory to repay either of the loans. However Creditor did require Debtor to maintain minimum inventory. Two years later, Debtor faced financial difficulties and entered into a consignment arrangement with one of its suppliers. After being denied access to the inventory, the supplier sued Debtor and under a court-issued preliminary injunction, some inventory was sold and a portion of the proceeds were paid to the supplier. Creditor then intervened in the case, claiming the inventory belonged to Debtor and due to its security interest, the inventory and proceeds were Creditor's collateral. The district court agreed that Debtor owned the inventory and accordingly, the inventory had been subject to Creditor's perfected security interest. However, the court also reasoned that by permitting the sale of inventory and not requiring the proceeds to be used to repay the loans, Creditor had already authorized the sale of the inventory and transfer of proceeds free of Creditor's security interest. The appeals court affirmed.

IV. Guaranties

A. *Hale v. MacLeod*, 904 S.E.2d 142 (N.C. Ct. App. 2024)

Creditor sued CBD company in which he invested $250,000 secured by a note and personal guaranties of the principals equal to the amount of their own ownership percentages until they "no longer own[] any portion of the Company or the Company has terminated the guarantor's employment with the company." When the business failed, creditor sought to recover his investment against the guarantors, who had separated from the company as a condition of the assignment of assets to a liquidating entity. The guarantors argued that it did not matter whether their separation was voluntary or not, that is equated to a "termination" under the guaranties. At the Rule 12 stage of pleadings, because creditor pled that the guarantors told him they resigned, and were not terminated, creditor sufficiently pled a claim under the guaranties as "termination" did not include resignation – if that was the intention it should have been stated as such.

V. Contract Interpretation

A. *Holsum De Puerto Rico, Inc. v. ITW Food Equipment Corp.*, 116 F.4th 59 (1st Cir. 2024)

The sales contract at issue was for the purchase of a machine for cookie sandwiching. Manufacturer used a detailed contract with technical specifications, and payment and shipping

terms. A bullet point at the end of the short warranty section included a link to a website where it had "a complete list of our Terms and Conditions and Warranty details". Those terms and conditions included a shifting fee provision for the prevailing party in litigation and a notice in fine print that stated sales of its products were subject to acceptance of those terms. After litigation resulting from claims about the machine, and the buyer lost, seller attempted to enforce the fee shifting provision. The Court found that while an agreement can incorporate terms in another document by reference, the reference in this case did not clearly communicate to the buyer that by accepting the agreement it was binging itself to further promises.

B. *Balsimo v. Venture One Stop, Inc.*, 13 N.W.3d 228 (Wis. Ct. App. 2024)

Purchaser of an RV signed a contract with a right to cancel either within 24 hours after seller accepted the offer to purchase for 2% of the price, or for 5% if cancellation is initiated after 24 hours from acceptance of the offer to purchase. Seller accepted buyer's offer to purchase, and a contract was formed. Subsequently buyer accepted delivery of the RV. Buyer attempted to return the RV within 24 hours and rely upon the penalty provision. Seller argued that provision only applied before the parties performed under the contract and thus buyer had no right to return. The Court found, based upon the language in the contract and Article 2 (Sales) that the provision regarded only acceptance of the offer to purchase, not acceptance as in performance. Once the parties executed the sale, the executory nature of the contract disappeared as did the opportunity to cancel the acceptance of the offer to purchase. Performance occurred and principles related to performance thus had to be considered. There was no contractual agreement to repudiate the acceptance of the RV.

C. *Hidden Lake Resorts Homeowners Association, Inc. v. Moore*, 2024 WL 2844447 (Tenn. Ct. App. 2024)

In this appeal arising from the Hidden Lake Resorts development, the court addressed whether a successor purchaser could be relieved of the original developer's obligations by actions taken solely by the homeowners' association's board. After foreclosure, the bank acquired the property and later sold it to a successor who sought to limit or avoid infrastructure duties through HOA governing document amendments the board approved shortly before closing. Those amendments purported to redefine the declarant and cap the successor's liability, effectively approving a sale free of the obligations to complete roads, utilities, and other improvements tied to annexation and the recorded covenants. The Court of Appeals affirmed the trial court's conclusion that these amendments were invalid because the board lacked authority to alter material rights and obligations absent approval by the requisite percentage of HOA members – and, where applicable, eligible mortgage holders – under the recorded covenants and bylaws. The court further held that the declarant obligations ran with the land and could not be severed by private assignment language purporting to transfer only rights without duties. Equitable estoppel failed because the successor and his counsel knew or had the means to know member approval was required. The judgment was affirmed in all respects.

Reel Ethics:
A Tribute to Gene Hackman

Mid-South Commercial Law Institute
December 4, 2025

HON. BARBARA D. HOLMES
United States Magistrate Judge
United States District Court, Middle District of Tennessee

and

EDWARD D. LANQUIST, JR.
Baker Donelson

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Class Action - Fairness, conflicts, and responsibilities

An associate, played by Mary Elizabeth Mastrantonio, wants to try a products liability case relating to a defective automobile, in which the plaintiffs are represented by her father (played by Gene Hackman). The associate is sleeping with a partner. The partner gave faulty advice on a report. The partner now seeks to bury the report.

Rule 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, 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 all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

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

Rule 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Truth Is Stranger than Hollywood

1. A husband and wife filed chapter 13 bankruptcy owning three houses. They planned to surrender two and live in one. Each house had multiple loans against it. Wells Fargo had liens securing loans on several of the houses, including a lien on the house the debtors intended to keep. In the District of Nevada, the two chapter 13 trustees held weekly preconfirmation meetings the morning before the afternoon chapter 13

confirmation hearings and claims objections. In any particular week, there were rarely few than 100 chapter 13 cases scheduled for confirmation; on occasion, there were more than 250. As a result, the meetings were apparently no unlike a bazaar, with all the attendant bargaining and confusion. At the preconfirmation meeting, a lawyer representing Wells Fargo presented the debtors' counsel with a stipulation lifting the automatic stay on one of the debtors' properties, which they both believed to be a property the debtors intended to surrender. But the stipulation contained the legal description of the home the debtors intended to keep. "In the buzz of the bazaar, both lawyers failed to match up the documents with their clients' intent." When the mistake was pointed out, Wells Fargo's lawyer acknowledged it, but he refused to sign a stipulation vacating the mistaken stipulation because Wells Fargo would not consent. After an evidentiary hearing, the bankruptcy court vacated the mistaken stipulation. And issued an order for Wells Fargo and its lawyers to show cause why they "individual and collective conduct in refusing to aid the debtors in rectifying the admitted mistake." The individual lawyer representing Wells Fargo was an association, who "presumably answer[ed] to higher-ups." He was also described by the bankruptcy judge as "unflaggingly courteous and civil in all matters." But "reputation and personal affability" did not excuse his conduct. Citing RPC 5.2(a), the bankruptcy court noted that "[a] lawyer is not freed from ethical duties simply by virtue of practicing under the direction of a senior lawyer." That lawyer received a private reprimand and was not subject to the monetary sanctions imposed. The bankruptcy stated:

> Although the lawyer from Cooper Castle participated fully in the sanctionable activities described above, the motives behind that assistance are obviously different from those of the law firm that employs him. He cannot be fairly tarred with the same brush that seeks to deter the blind following of client instructions that violate the governing rules of professional conduct; he may have been following instructions, but his livelihood was more directly affected. And he has been nothing but honest in disclosing the reasons for his actions in this matter.

Wells Fargo and its law firm were ordered to pay the debtors' attorney fees for obtaining an order setting aside the mistaken stipulation and denied fees otherwise collectible under the mortgage documents for fees accrued in connection with the motion to vacate the order granting relief from the stay and the show cause order. *In re Martinez*, 393 B.R. 27 (Bankr. D. Nev. 2008)

2. Keep in mind that fee agreements between different firms impose "[j]oint responsibility for the representation [that] entails the obligations stated in RPC 5.1 for purposes of the matter involved. Comment 7 to RPC 1.5(e). Cited in *Clark v. Baker*, 2025 WL 2491015 (Tenn. Aug. 2025).

3. "A lawyer's good name and professional reputation are his primary stock in trade, an asset to be cultivated and safeguarded throughout his career—even after ceasing the active practice of law. In an era when lawyers are often held in popular disdain, every lawyer should be vigilant to promote the integrity of the profession and the justice system in which we serve. Lawyers do this primarily in their day to day practice through how they meet and counsel clients in need; through how they advocate on their clients' behalf, in communications written and oral, with other lawyers and various tribunals; and through how they refrain from associating their good name with causes and

arguments that would bring them and the profession into disrepute. … This case presents a sad example of a decent lawyer, who, in the autumn of a successful career, became careless in permitting the use of his name for improper purposes and needlessly brought dishonor on himself, his firm, the profession, and the justice system. In this appeal, the sadness is compounded by the lawyer's refusal to acknowledge his own misfeasance and his insistence on blaming others. Finding that the appellate arguments warrant only short shrift, we summarily affirm the order of discipline." *In re Doud*, 713 F.App'x 491 (6th Cir. 2018). Semi-retired attorney was suspended for 90 days for let others draft and sign his name to "one-size-fits-all" pleadings

4. Disbarred lawyer, Richard L. Crosby, III, was indicted three times on state and federal charges of wire fraud, Social Security number fraud, and aggravated identify theft for using false credentials to obtain jobs at two law firms. While facing disciplinary proceedings in Ohio in 2021, Crosby resigned from the practice of law. Crosby pled guilty to state charges of stealing client funds and telecommunications fraud in 2023 and was sentenced to probation. While the criminal cases in Ohio were pending, Crosby allegedly used a false identity to apply for at least three different law firm jobs. He reportedly claimed to be licensed in New York and DC. He supported his false identity with Social Security and passport numbers belonging to a former romantic partner. In June 2021, Crosby was hired by a DC firm, where he worked briefly. He used the same alias to apply to a law firm in Miami, which extended him an offer and where he worked for approximately six months for which he was paid roughly $83,000. The law firm also reportedly paid a recruiter $50,000 in connection with the ire. Eventually, the firm received an inquiry from an investigator with the Clermont County Child Support Enforcement Office, making the firm aware of Crosby's true identity. He was fired. Undeterred, Crosby allegedly tried for at least one more law firm job using his alias. This time he doctored a screen shot of the alias name in the online DC bar membership directory and attached it to his resume. That Florida firm initially hired him with a starting salary of $195,000 and a $10,000 signing bonus, but discovered his use of a false identity before he started work and did not hire him. Crosby pled guilty to three counts of Social Security number fraud and agreed to recommended sentence of 37 months in federal prison with nearly $171,000 in restitution.

5. On January 6, 2016, a Williamson County lawyer was publically censured for using the notary stamp of an associate attorney in her office to notarize a pleading (later filed with the court) by signing the associate's name to the notarization without the associate's authority.

6. Partners in a defunct law firm received various sanctions, including reprimand, 6-month suspension, and 1-year suspension, for ethical violations, including failing to properly supervise lawyers and non-lawyer employees. *In re Tomar, Simonoff, Adourian, O'Brien, Kaplan, Jaocby & Graziano, P.C.*, 953 A.2d 1201 (N.J. 2008).

7. Attorneys' Liability Assurance Society ("ALAS") recommends being watchful of the following circumstances, including, if feasible, through the use of an interactive dashboard to visualize and interrogate current time billing, and staffing data on demand:

- Dabbling lawyers (who may be more prone to mistakes);
- Lone wolf partners (who may be more prone to mistakes, advances of unworthy clients, and undetected impairments);
- Under-supervised associates (who may be more prone to mistakes);
- High hour lawyers (who may be more prone to mistakes and undetected impairments);
- Low hour lawyers (who may be more prone to advances of unworthy clients and undetected impairments); and,
- Siloed teams (who may be more prone to unworthy clients).

D. Joseph Piech, *Using Data and Innovation to Reduce Malpractice Legal Malpracctice Risk*, ALAS (Spring 2023).

8. New Mexico attorney who was local counsel failed to verify authenticity of forged prescription before introducing it into evidence. One-year suspension was deferred conditioned on one-year probationary period with supervision by practice monitor. Court found no support for hearing committee's concern that respondent attorney's law firm assigned her to case despite her lack of experience because she was not guided in her actions by a supervisory attorney within the firm, and, even if she had been, there was no arguable question of her duty not to submit fraudulent evidence. *In the Matter of Estrada*, 143 P.3d 731 (N.M. 2006).

9. Lawyer suspended for 6 months for failing to properly supervise attorneys who were also sanctioned for their repeated failures to keep clients reasonably informed, not adequately advising clients, and not following clients' instructions. Court noted that practice was exclusively criminal defense and bankruptcy, which meant that clients were generally unsophisticated. Suspension of supervising lawyer was reduced from 6 months and 1 day, because any suspension over 6 months required application for and approval of reinstatement and was therefore effectively a much longer suspension. *In the Matter of Phillips*, 244 P.3d 549 (Az. 2010).

10. Two attorneys representing same client received public reprimands for various misconduct in connection with 6 ½ year representation on same matter. Both were found "guilty" of failing to properly supervise subordinate attorney. Subordinate attorney, who left the firm long before the client's complaint, was found "not guilty" by Kentucky Bar Association Board of Governors (after being found "guilty" by trial commissioner) of failing to act with reasonable diligence and failing to adequately communicate with the client, and action against him was dismissed. *Kentucky Bar Association v. Weinberg, et. al.*, 198 S.W.3d 595 (Ky. 2006).

11. From 2006 through 2008, Hill's wife was office manager of his solo practice in his hometown of Hugo, Oklahoma, other than a one-month period when they were separated and a first divorce action was pending. Even though Hill's wife subsequently instituted another divorce action, she remained as his office manager, even during his in-patient treatment for depression and ultimate relocation to Oklahoma City to enter to the Lawyers Helping Lawyers program. Hill's wife, along with various secretarial staff, began writing checks with his rubber stamped signature on the firm's operating

account and trust accounts without Hill's knowledge or consent. Hill was found to have engaged in misconduct for failing to properly supervise non-lawyer staff and received public censure, largely because Hill made full restitution so that no client suffered an actual loss. *State of Oklahoma ex rel Oklahoma Bar Association v. Hill*, 281 P.3d 1264 (Ok. 2012).

12. Cohen received 30-day suspension for failing to properly supervise subordinate attorney (also named Cohen, but no indication in opinion whether related to respondent). Subordinate attorney filed trademark application before the PTO, but later filed a trademark application withdrawal without the client's knowledge or consent, and which stated that the application was expressly abandoned, which was materially false. Cohen conceded that there was no system in place in his law firm to "impart rudimentary ethics training to lawyers … particularly the less experienced ones. Equally troubling was the lack of a review mechanism which allowed an associate's work to be reviewed and guided by a supervisory attorney." Cohen challenged the finding of the BPR that he knew or should have known of the subordinate attorney's dishonesty. Court agreed with BPR that supervising attorneys are required under rules to reasonably monitor the course of representation of the firm's clients. Even though supervising attorneys may not be personally responsible for misconduct of subordinates, they are responsible for failing to properly supervise such subordinates, which constitutes separate and distinct misconduct. *In re Cohen*, 847 A.2d 1162 (D.C. Ct. App. 2004).

13. Smith, a two-year associate, was assigned a personal injury case initiated by a call from potential clients in response to firm's ad. Smith visited one of clients in the hospital and obtained her signature, including on behalf of her husband (even though she had no power of attorney), for a contingent-fee representation. After settlement, Smith, at direction of supervising attorney, was directed to revise disbursement statements to clients to "make [the numbers] work" to combine their separate recoveries so that contingency fee could be collected from combined amount. This resulted in wife receiving a smaller disbursement than reflected on the original disbursement itemization sent to her. Smith found to have violated rule against excessive fees. Court refused to accept Smith's defense that he was acting under direction from supervising attorney, stating that "[a] lawyer's obligations under the ethics rules are not diminished by the instructions of a supervising attorney." Nor did Court accept Smith's argument that the later-amended RPC's provided a safe harbor, noting that the fees were clearly excessive, so Smith could not have reasonably relied on any instruction from the supervising attorney otherwise. Smith received a public reprimand. *Disciplinary Counsel v. Smith*, 918 N.E.2d 992 (Ohio, 2009).

14. Arthur J. Lachman, *What You Should Know Can Hurt You: Management and Supervisory Responsibility for the Misconduct of Others Under Model Rules 5.1 and 5.3*, 18 NO. 1 PROF. LAW. 1 (2007); Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199 (Winter 2007); Rachel Reiland, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take A Closer Look at Model Rules 5.1, 5.2 and 5.3*, 14 GEO. J. LEGAL ETHICS 1151 (Summer 2001).

15. According to ALAS, law firm practice group management "is a significant line of defense in avoiding or mitigating malpractice claims and is a key component in the law firm's culture. In addition, good practice group management improves the quality of a firm's client representations." Some best practices:

    - If lawyers are following a hybrid schedule that combines remote and in-office work, ensure that there is a system for training that encourages feedback, questions, and discussion;
    - Ensure that supervising lawyers and mentors thoughtfully plan regular meetings and check-ins with the junior lawyers they supervise or mentor;
    - While focusing on substantive legal training, supervisors and mentors should also confirm that junior lawyers understand and are adhering to firm policies;
    - Work with firm administrators to create data-driven reports that can be used to monitor matters, for example reports that note when excessive hours are billed to "general" files and that show the partner-to-associate hours ratio on billed matters;
    - Talk with administrative assistances, paralegals, and other administrative personnel in the practice group to create a culture of loss prevention awareness.
    - Be aware of and check-in with lawyers who may be struggling because of societal, family, or other personal events or circumstances;

    Mary Beth Robinson, *The Practice Group Leader's Loss Prevention Responsibilties*, ALAS (Spring 2023).

ARTIFICIAL INTELLIGENCE IN LEGAL PRACTICE: A COMPREHENSIVE OVERVIEW

Runaway Jury – Rankin Fitch played by the late Gene Hackman uses technology and any other means available to gain an advantage in a potentially groundbreaking trial.

The legal profession stands at a technological crossroads. Artificial intelligence, once confined to the realm of science fiction, has emerged as a transformative force reshaping how lawyers research, draft, analyze, and deliver legal services. This revolution brings unprecedented opportunities for efficiency and accuracy, but it also introduces complex ethical considerations that demand careful examination by every legal professional.

The Scale of the Problem

According to Damien Charlotin's database tracking these incidents, there have been at least 262 identified cases globally as of 2025 - likely an undercount of the true scale. The United States leads with 91 of 129 tracked cases (70%), followed by Israel with 14 cases, the United Kingdom with 8, and various other countries including Canada, Australia, Brazil, and South Africa reporting multiple incidents. The trajectory is alarming: from just 10 rulings in 2023 to 37 in 2024, and then 73 in just the first five months of 2025. Since April 2025, new cases have been "popping up every day."

The Current Landscape of AI in Legal Practice

Artificial intelligence has moved from experimental curiosity to essential tool in remarkably short order. Today's legal practitioners encounter AI technologies across virtually every aspect of their practice, from initial client intake to complex litigation strategy. Understanding these technologies—their capabilities, applications, and limitations—has become not merely advantageous but ethically imperative for competent legal representation.

The integration of AI into legal practice represents more than simple automation of routine tasks. Modern AI systems can analyze vast datasets, identify patterns invisible to human review, and generate sophisticated legal content. However, this power comes with inherent risks and responsibilities that legal professionals must navigate with precision and care.

The Benefits of AI Tools in Legal Practice

The advantages of AI integration extend far beyond simple efficiency gains. These technologies can democratize access to sophisticated legal capabilities, reduce costs for clients, and improve the overall quality of legal services when properly implemented.

Enhanced Efficiency and Productivity: AI tools can process vast amounts of information in seconds, allowing lawyers to focus on higher-value strategic work. Document review that once required teams of attorneys can be completed by smaller groups with AI assistance. Legal research that consumed entire days can be accomplished in hours.

Improved Accuracy and Consistency: Well-designed AI systems can reduce human error in routine tasks. Contract review AI consistently identifies specific clause types without the fatigue that affects human reviewers. Citation checking becomes more reliable, and document formatting maintains consistency across large projects.

Cost Reduction for Clients: By automating routine tasks, AI enables lawyers to provide services more cost-effectively. Clients benefit from reduced legal fees while maintaining service quality. This democratization effect can expand access to legal services for individuals and businesses previously priced out of the market.

Strategic Insights: Predictive analytics and pattern recognition capabilities can reveal insights invisible to human analysis. These tools can identify trends in judicial decision-making, opposing counsel strategies, and industry practices that inform more effective legal strategies.

Limitations and Known Risks

Despite their impressive capabilities, AI systems in legal practice carry significant limitations and risks that legal professionals must understand and address.

Algorithmic Bias and Fairness Concerns: AI systems trained on historical legal data may perpetuate existing biases in the legal system. Predictive analytics tools might reflect historical discrimination in judicial decision-making or prosecutorial practices. These biases can influence case assessments, settlement recommendations, and strategic decisions in ways that disadvantage certain groups.

Data Privacy and Security Vulnerabilities: Many AI platforms require uploading client data to cloud-based systems, creating potential confidentiality risks. Data breaches, unauthorized access, and inadequate encryption can expose sensitive client information. The global nature of many AI platforms raises questions about data sovereignty and compliance with various privacy regulations.

Over-reliance and Deskilling Risks: Excessive dependence on AI tools may erode fundamental legal skills. Junior attorneys who rely heavily on AI-generated research may not develop critical analytical abilities. Partners who depend on AI for strategic recommendations may lose touch with the intuitive judgment that characterizes experienced legal practitioners.

Quality Control Challenges: AI-generated content requires careful human review, but the sophistication of these systems can create a false sense of security. Errors in AI output may be subtle and difficult to detect, particularly when they involve complex legal reasoning or factual analysis.

Regulatory and Compliance Uncertainty: The rapid evolution of AI technology has outpaced regulatory frameworks, creating uncertainty about compliance requirements, liability standards, and professional responsibility obligations. This regulatory lag places additional burdens on legal professionals to establish their own ethical guidelines and risk management protocols.

Looking Forward: The Future of AI in Legal Practice

The integration of artificial intelligence into legal practice represents an irreversible trend that will continue accelerating. Legal professionals who understand these technologies, their applications, and their limitations will be better positioned to serve clients effectively while managing associated risks.

Success in this evolving landscape requires more than technical knowledge. Legal practitioners must develop new competencies in AI oversight, risk assessment, and technology management. They must establish robust quality control processes, implement appropriate confidentiality safeguards, and maintain the human judgment that remains central to effective legal representation.

The ethical implications of AI in legal practice extend beyond compliance with existing professional responsibility rules. These technologies challenge fundamental assumptions about legal work, client relationships, and professional competence. Legal professionals must grapple with questions about transparency, accountability, and the appropriate balance between technological efficiency and human expertise.

As artificial intelligence continues evolving, legal professionals face both unprecedented opportunities and significant responsibilities. Those who approach AI integration thoughtfully, with appropriate attention to ethical considerations and risk management, will enhance their ability to serve clients effectively. Those who ignore these technologies or implement them carelessly risk both professional liability and the erosion of public trust in the legal profession.

The future of legal practice will be defined not by the choice between human expertise and artificial intelligence, but by the wisdom with which legal professionals integrate these powerful tools while preserving the core values and ethical principles that define competent legal representation.

Key Ethical Rules and Doctrines Implicated by Artificial Intelligence in Legal Practice

The integration of artificial intelligence into legal practice creates a complex web of ethical obligations that challenges traditional interpretations of professional responsibility rules. While the Model Rules of Professional Conduct were drafted long before the advent of modern AI technologies, their fundamental principles remain applicable and indeed become more critical as lawyers increasingly rely on sophisticated automated systems. This comprehensive analysis examines how five key ethical rules intersect with AI usage, creating new obligations and requiring careful interpretation of existing professional standards.

The ethical landscape surrounding AI in legal practice is not merely academic. Recent disciplinary actions, bar opinions, and court sanctions demonstrate that failure to properly navigate these obligations can result in serious professional consequences. Legal practitioners must understand not only what these rules require in traditional contexts, but how their application evolves when human decision-making is augmented or partially replaced by artificial intelligence systems.

Rule 1.1: Competence and the Duty of Technological Understanding

The Foundation of Professional Competence

Model Rule 1.1 establishes the fundamental obligation that a lawyer shall provide competent representation, requiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This seemingly straightforward requirement has gained new complexity and urgency in the age of artificial intelligence.

The rule's application to technology was clarified in 2012 when the American Bar Association added Comment 8, which explicitly addresses technological competence: "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." This addition was prescient, arriving years before the current AI revolution but establishing the principle that technological literacy is not optional for competent legal practice.

Technological Competence in the AI Era

The duty of technological competence takes on heightened significance when applied to artificial intelligence systems. Unlike traditional legal technologies such as word processing or case management software, AI systems make decisions, generate content, and provide analysis that directly impacts the substance of legal representation. A lawyer who uses AI without understanding its capabilities and limitations may violate Rule 1.1 even if the AI produces seemingly satisfactory results.

Competence in AI usage requires understanding several critical concepts. Lawyers must grasp how their chosen AI systems are trained, what data sources inform their outputs, and what types of errors or biases might affect results. They must understand the difference between AI systems that retrieve existing information and those that generate new content. Most importantly, they must develop the judgment to recognize when AI outputs require verification, modification, or rejection.

The competence requirement also extends to understanding the legal and factual domains where AI tools are most and least reliable. For instance, a lawyer might competently use AI for initial contract drafting but would violate Rule 1.1 by relying on AI-generated case law citations without verification. The *Mata v. Avianca* case provides a stark example of this principle in action, where attorneys faced sanctions not merely for using AI, but for failing to verify AI-generated legal research that contained fabricated citations.

The Associate-or-Educate Standard

Comment 8 to Rule 1.1 provides a crucial alternative for lawyers who lack technological expertise: "A lawyer may comply with the duty of competence by . . . consulting with a lawyer reasonably believed to be competent in the technology in question." This provision recognizes that not every lawyer must become a technology expert, but every lawyer must ensure that technological competence exists within their representation team.

In the AI context, this might involve partnering with lawyers who have developed AI expertise, consulting with technology professionals who understand AI systems, or engaging vendors who can provide appropriate guidance and oversight. However, the delegation of technological understanding does not eliminate the individual lawyer's responsibility to maintain sufficient knowledge to supervise AI usage effectively and to recognize when expert consultation is necessary.

The "associate-or-educate" approach also requires ongoing attention as AI technologies evolve rapidly. A lawyer who achieved AI competence six months ago may find their knowledge outdated as new systems emerge and existing platforms change their underlying models or training

data. Continuing education in AI technologies is not merely advisable but may be necessary to maintain competent representation.

Practical Applications of AI Competence

Competent AI usage requires establishing and maintaining several practical capabilities. Lawyers must develop skills in prompt engineering—the art of crafting inputs that produce reliable and useful AI outputs. They must understand how to structure AI interactions to minimize hallucinations and maximize accuracy. They must learn to recognize the warning signs that suggest AI output may be unreliable or require additional verification.

Competence also requires understanding the different types of AI tools and their appropriate applications. A lawyer might competently use AI for document review in discovery but lack the competence to rely on AI for complex legal analysis in appellate briefing. The competence standard is contextual and depends on the specific application, the stakes involved, and the lawyer's understanding of both the technology and the legal domain.

Rule 1.6: Confidentiality and the Protection of Client Information

The Fundamental Confidentiality Obligation

Rule 1.6 establishes one of the legal profession's most sacred duties: "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 this Rule." This broad confidentiality obligation extends far beyond attorney-client privilege and encompasses virtually all information related to client representation.

The rule's application to AI systems presents unprecedented challenges. Many AI platforms operate through cloud-based services that process client data on remote servers, potentially in multiple jurisdictions. Some AI systems use input data to improve their models, effectively incorporating client information into the system's knowledge base. These practices raise immediate questions about whether AI usage constitutes "revelation" of client information within the meaning of Rule 1.6.

Cloud-Based AI and Data Security

The majority of AI tools available to lawyers operate through cloud-based platforms that require uploading client data for processing. This creates immediate confidentiality concerns under Rule 1.6, particularly when combined with Comment 18's requirement that lawyers make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

The "reasonable efforts" standard requires lawyers to evaluate the security measures implemented by AI vendors, including encryption protocols, access controls, data retention policies, and deletion procedures. However, many AI platforms provide limited transparency about their security practices, making it difficult for lawyers to conduct adequate due diligence. Some platforms explicitly disclaim responsibility for data security, placing the entire confidentiality risk on the lawyer.

International data storage presents additional complications. Many AI platforms store and process data in multiple countries, potentially subjecting client information to foreign legal regimes with different privacy protections and government access rights. Lawyers must consider whether such arrangements comply with Rule 1.6's confidentiality requirements and any additional obligations imposed by client contracts or industry regulations.

Rule 5.1 & 5.3: Supervision of Lawyers and Nonlawyer Assistants

The Supervision Framework

Rules 5.1 and 5.3 establish comprehensive obligations for supervising lawyers and nonlawyer assistants within law firms and legal organizations. Rule 5.1 requires partners and supervisory lawyers to make reasonable efforts to ensure that subordinate lawyers conform to professional conduct rules. Rule 5.3 extends similar obligations to nonlawyer assistants, requiring that they be given appropriate instruction concerning ethical obligations and that their work be supervised adequately.

The application of these supervision rules to AI systems presents novel interpretive challenges. AI systems are neither lawyers nor traditional nonlawyer assistants, yet they perform tasks that directly affect client representation and generate work product that carries professional responsibility implications. Legal ethics authorities have begun conceptualizing AI systems as sophisticated "nonlawyer assistants" subject to Rule 5.3's supervision requirements, but this analogy has limitations.

AI as "Nonhuman Assistants"

The characterization of AI systems as nonlawyer assistants subject to Rule 5.3 creates a framework for understanding supervision obligations, but it also highlights the unique challenges these systems present. Traditional nonlawyer assistants can be trained, instructed, and supervised through direct human interaction. They can exercise judgment, ask clarifying questions, and escalate issues beyond their competence. AI systems, by contrast, operate according to algorithmic processes that may be opaque even to their developers.

This fundamental difference requires adapting traditional supervision concepts to technological realities. Supervising an AI system involves understanding its training data, algorithmic processes, and output characteristics rather than providing direct instruction and oversight. It requires establishing quality control processes that can identify AI errors or biases that human assistants might recognize and flag independently.

The supervision obligation also extends to ensuring that AI systems are used within their competence limitations. Just as a lawyer cannot assign complex legal analysis to an untrained paralegal, lawyers cannot rely on AI systems for tasks beyond their demonstrated capabilities. This requires ongoing assessment of AI performance across different types of legal work and different factual contexts.

Rule 3.3: Candor to the Tribunal

The Duty of Honesty in Legal Proceedings

Rule 3.3 establishes lawyers' fundamental obligation to be truthful in statements of fact and law to tribunals and to correct any false statements of material fact or law. This rule takes on

critical importance in the age of AI-generated legal content, particularly given AI systems' tendency to "hallucinate"—generating plausible but factually incorrect information, including fabricated case citations, nonexistent legal authorities, and inaccurate factual assertions.

The *Mata v. Avianca* case serves as a watershed moment demonstrating how AI hallucinations can lead to Rule 3.3 violations and serious professional sanctions. In that case, attorneys submitted legal briefs containing AI-generated case citations that were entirely fabricated, leading to court sanctions and disciplinary proceedings. The case illustrates that lawyers cannot simply delegate legal research to AI systems without maintaining responsibility for the accuracy of their submissions.

AI Hallucinations and Fabricated Citations

AI hallucinations represent a unique challenge for legal practitioners because they can be extraordinarily convincing. Unlike obvious errors or typos, AI-generated hallucinations often appear professionally written, internally consistent, and legally plausible. The fabricated cases in *Mata v. Avianca* included realistic case names, proper legal citation formats, and substantively relevant legal holdings—making them difficult to identify as false without independent verification.

The problem extends beyond case law to include fabricated statutes, regulations, legal standards, and factual assertions. AI systems may generate citations to nonexistent law review articles, reference legal principles that sound authoritative but are inaccurate, or create fictional facts that support desired legal conclusions. The sophistication of these hallucinations means that traditional proofreading and editing may not identify the errors.

Legal practitioners must develop systematic approaches to verifying AI-generated legal content. This verification process should include checking all case citations in original sources, confirming the accuracy of legal quotations, and independently researching legal principles that appear unfamiliar or unusually favorable. The verification burden is particularly high for legal authorities that strongly support the lawyer's position, as AI systems may be more likely to hallucinate supportive precedents.

The Verification Imperative

Rule 3.3's candor requirements create an absolute duty to verify AI-generated legal content before submission to tribunals. This duty cannot be satisfied through superficial review or spot-checking selected citations. Instead, lawyers must implement comprehensive verification protocols that ensure the accuracy of all factual and legal assertions in their submissions.

Effective verification requires access to reliable legal databases and the time necessary to conduct thorough research. Lawyers cannot simply rely on AI-generated summaries of case law but must read the actual decisions to confirm their holdings, reasoning, and relevance to the matter at hand. This verification process may reduce some of the efficiency gains that initially attract lawyers to AI tools, but it is essential for compliance with Rule 3.3.

The verification duty also extends to understanding the context and currency of legal authorities. AI systems may accurately cite legal precedents while failing to recognize that subsequent decisions have limited or overruled those authorities. They may correctly identify legal

principles while misapplying them to factual contexts where they are not relevant. Comprehensive verification requires not just confirming that legal authorities exist, but ensuring that they remain good law and are appropriately applied.

Disclosure Obligations and Professional Transparency

An emerging question in AI legal practice involves whether lawyers have obligations to disclose AI usage to tribunals, opposing counsel, or clients. While no clear consensus has emerged, several factors suggest that disclosure may be required or advisable in certain circumstances.

First, some courts have begun requiring disclosure of AI assistance in legal filings, recognizing the unique risks associated with AI-generated content and the need for appropriate judicial oversight. These disclosure requirements typically focus on ensuring that attorneys maintain responsibility for their submissions rather than prohibiting AI usage entirely.

Second, Rule 3.3's broader candor obligations may require disclosure when AI usage creates material risks of error or when opposing parties might be misled about the nature of legal work product. If AI-generated content contains subtle errors or biases that could affect case outcomes, disclosure might be necessary to maintain the integrity of legal proceedings.

Finally, practical considerations often favor disclosure as a protective measure. When lawyers clearly communicate their AI usage and verification procedures, they demonstrate good faith efforts to comply with professional obligations and may receive more favorable treatment if errors do occur.

Developing AI-Aware Quality Control Systems

Compliance with Rule 3.3 in the AI era requires developing quality control systems specifically designed to identify and prevent AI-related errors. These systems should include multiple layers of review, with particular attention to the types of errors that AI systems commonly generate.

Human-in-the-Loop Review: Maintaining Professional Judgment

Designing Effective Oversight Systems

The concept of "human-in-the-loop" review represents a fundamental principle for safe AI implementation in legal practice. This approach ensures that human professional judgment remains central to legal decision-making while allowing AI systems to enhance efficiency and capability. Effective human-in-the-loop systems require careful design that specifies when human review is required, who is qualified to conduct such review, and what standards should guide the review process.

The design of oversight systems must account for the different types of AI outputs and their varying risk profiles. AI-generated legal research may require different review procedures than AI-assisted contract drafting, which may differ from AI-powered document review recommendations. The oversight system should categorize AI applications based on their potential impact on client representation and establish review requirements accordingly.

High-risk AI applications—such as those involving legal strategy recommendations, court filings, or client advice—typically require comprehensive human review by qualified attorneys.

Medium-risk applications might permit more streamlined review processes, while low-risk applications may require only spot-checking or periodic validation. The key is establishing clear criteria for categorizing AI applications and ensuring that review requirements match the potential consequences of AI errors.

The oversight system should also specify the qualifications required for different types of AI review. Complex legal analysis may require review by experienced attorneys with relevant subject matter expertise, while routine document processing might be appropriately reviewed by junior lawyers or supervised paralegals. The system should ensure that reviewers understand both the legal domain and the AI system's capabilities and limitations.

Quality Control Procedures

Effective human-in-the-loop review requires systematic quality control procedures that can reliably identify AI errors, biases, and limitations. These procedures must go beyond superficial proofreading to include substantive analysis of AI recommendations and outputs. Quality control should examine both the accuracy of specific AI outputs and their appropriateness for the particular client situation and legal context.

Quality control procedures should include verification protocols for factual assertions, legal authorities, and analytical conclusions generated by AI systems. This verification should use independent sources rather than relying on AI-generated summaries or explanations. For legal research, this means checking original case law, statutes, and regulations rather than accepting AI characterizations of legal authorities.

The quality control process should also evaluate the completeness and balance of AI outputs. AI systems may miss relevant authorities, fail to consider alternative legal theories, or present one-sided analysis that omits important counterarguments. Human reviewers must assess whether AI outputs provide comprehensive analysis appropriate for the specific legal matter.

Truth is Stranger than Hollywood

Case Studies and Bar Guidance: Lessons from AI Failures in Legal Practice

The Foundational Case: Mata v. Avianca Inc.

Case Overview and Procedural History

Mata v. Avianca Inc., No. 22-CV-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023), stands as the seminal case demonstrating the catastrophic consequences of inadequate AI oversight in legal practice. The case arose from a personal injury lawsuit where plaintiff Roberto Mata sued Avianca Airlines, alleging that he was injured when a metal serving cart struck his knee during an international flight from El Salvador to John F. Kennedy Airport.

Plaintiff's counsel, Steven Schwartz of Levidow, Levidow & Oberman, used ChatGPT to conduct legal research for an opposition brief responding to defendant's motion to dismiss for lack of personal jurisdiction. The attorneys submitted a brief containing citations to six cases that appeared to support their legal arguments against dismissal. However, upon examination by opposing counsel and the court, all six cases proved to be entirely fictitious—sophisticated fabrications generated by ChatGPT that included realistic case names, proper citation formats, and substantively relevant legal holdings that simply did not exist.

The Court's Analysis and Sanctions

Judge P. Kevin Castel's opinion provides a detailed analysis of how the attorneys' reliance on AI violated fundamental professional obligations. The court found that the attorneys had violated Federal Rule of Civil Procedure 11(b), which requires that legal contentions be supported by existing law or good faith arguments for extending existing law. The fabricated citations clearly failed this standard, as they purported to cite existing legal authorities that did not exist.

The court rejected the attorneys' arguments that their use of ChatGPT constituted good faith legal research, noting that the attorneys failed to verify the citations through any traditional legal research method. Judge Castel emphasized that while AI tools may assist legal research, they cannot replace the attorney's fundamental obligation to ensure the accuracy of legal authorities cited in court filings.

The sanctions imposed included a monetary penalty of $5,000 and a requirement that the attorneys notify the courts where the fabricated cases had been cited in other matters. The court also required the attorneys to send letters to plaintiff Roberto Mata and to each judge falsely identified as the author of the fake opinions, identifying and attaching the court's opinion and order along with hearing transcripts.

Prevention Analysis: How This Could Have Been Avoided

The *Mata* disaster was entirely preventable through implementation of basic verification procedures that should accompany any AI usage in legal research. As noted in the analysis, had the Mata lawyers understood the "risks associated with" ChatGPT, they would not have filed a brief containing fake cases. Mr. Schwartz testified at the sanctions hearing that he was "operating under the false perception that [ChatGPT] could not possibly be fabricating cases on its own."

The attorneys could have avoided sanctions through several straightforward measures:

Primary Verification: The most obvious prevention would have been verifying the cited cases through traditional legal databases such as Westlaw, Lexis, or Google Scholar. The court emphasized the "gatekeeping role" attorneys must play "to ensure the accuracy of their filings." A close review of the bogus decisions would have raised multiple red flags and provided an offramp to avoid an inaccurate submission and sanctions.

Secondary Research: Even without access to premium legal databases, the attorneys could have conducted basic internet searches for the case names and citations. The complete absence of any reference to these cases online would have raised immediate red flags about their authenticity.

AI Limitation Understanding: The attorneys failed to understand ChatGPT's well-documented tendency to "hallucinate" or generate plausible but false information. When Schwartz later questioned ChatGPT about the authenticity of the cases, the AI tool doubled down, claiming the cases "indeed exist" and were available on "reputable legal databases such as Westlaw and LexisNexis."

Systematic Quality Control: Implementation of firm policies requiring verification of all AI-generated citations would have caught these errors before filing. Such policies represent basic risk management for any legal organization using AI tools.

Park v. Kim: The Pattern Continues

Case Background and Similar Failures

Park v. Kim, No. 22-02057 (2d Cir. Jan. 30, 2024), demonstrated that the lessons of *Mata* were not immediately absorbed by the legal profession. In this case, attorney Jae Lee of JSL Law Offices submitted opposition papers containing ChatGPT-generated citations that, like those in *Mata*, proved to be entirely fictitious.

The case involved a medical malpractice appeal where Attorney Lee filed a reply brief that included citation to the non-existent "Bourguignon" case, which she admitted she generated using ChatGPT. Lee told the court she had "encountered difficulties in locating a relevant case" before she turned to ChatGPT for assistance.

Court Response and Consequences

The U.S. Court of Appeals for the Second Circuit found that Lee's conduct "fell well below the basic obligations of counsel" and referred her to the court's grievance panel for possible discipline such as fines and suspensions. The judges found that Lee "did not read or otherwise confirm the validity of the (non-existent) decision she cited."

Prevention Analysis

The prevention measures for *Park v. Kim* mirror those applicable to *Mata*, but the case's timing after *Mata* suggests additional preventive measures:

Professional Education: The attorney should have been aware of recent developments in AI-related professional liability through continuing legal education, bar publications, or professional news sources.

Criminal Defense Escalation: People v. Crabill

Colorado's Harsh Response to AI Misconduct

People v. Crabill, 2023 WL 8111898 (Colo. O.P.D.J. Nov. 22, 2023), represents the most severe disciplinary response to AI-related misconduct to date. The Presiding Disciplinary Judge suspended attorney Zachariah C. Crabill for one year and one day, with ninety days to be served and the remainder stayed upon successful completion of a two-year probation period.

In April 2023, a client hired Crabill to prepare a motion to set aside judgment in a civil case. Crabill, who had never drafted such a motion before, cited case law that he found through ChatGPT without reading the cases or attempting to verify their accuracy. After filing the motion in May 2023, Crabill discovered that the cases from ChatGPT were either incorrect or fictitious.

The Compounding Misconduct

Most troubling, Crabill did not alert the court to the fabricated cases at the hearing on the motion, nor did he withdraw the motion. When the judge expressed concerns about the accuracy of the cases, Crabill falsely attributed the mistakes to a legal intern. Only six days after the hearing did Crabill file an affidavit with the court explaining that he used ChatGPT when he drafted the motion.

Multiple Ethics Violations

Through this conduct, Crabill violated multiple Colorado Rules of Professional Conduct: Rule 1.1 (competent representation); Rule 1.3 (reasonable diligence and promptness); Rule 3.3(a)(1) (prohibition on false statements of material fact or law to tribunals); and Rule 8.4(c) (prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation).

Prevention Analysis

The *Crabill* case demonstrates how initial AI errors can compound into severe professional misconduct:

Immediate Disclosure: Upon discovering the fabricated citations, Crabill should have immediately notified the court and opposing counsel, potentially avoiding the more serious charges of deception and false attribution.

Competence Recognition: Crabill should have recognized his lack of experience with the type of motion and either acquired competence through research and training or associated with experienced counsel.

Quality Control Systems: Basic verification procedures would have identified the fabricated cases before filing, preventing the entire sequence of misconduct.

Judicial Response: Standing Orders and New Requirements

Judge Brantley Starr's Pioneering Order

U.S. District Judge Brantley Starr of the Northern District of Texas became the first federal judge to issue a standing order addressing AI usage, requiring attorneys to file a certificate attesting either that no portion of any filing was generated by AI, or that any AI-generated content was verified for accuracy by a human being.

Judge Starr's "Mandatory Certification Regarding Generative Artificial Intelligence" acknowledges that while AI platforms "are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument," legal briefing presents particular risks because "these platforms in their current states are prone to hallucinations and bias."

The Rationale for Judicial Intervention

Judge Starr emphasized that 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." AI tools are "unbound by any sense of duty, honor, or justice."

Spreading Judicial Requirements

Following Judge Starr's lead, multiple federal judges have implemented similar requirements. Judge Michael Baylson of the Eastern District of Pennsylvania issued a broader order requiring disclosure of any type of AI, while Magistrate Judge Gabriel Fuentes of the Northern District of Illinois requires disclosure specifically for generative AI use in legal research or document drafting.

The Escalating Pattern: Recent Major Firm Failures

Morgan & Morgan: Large Firm Vulnerability

Wadsworth v. Walmart Inc., No. 2:23-cv-118-KHR (D. Wyo. 2025), demonstrates that even large, well-resourced law firms are vulnerable to AI-related misconduct. Morgan & Morgan, ranked No. 42 in the United States by headcount, faced sanctions when three attorneys submitted motions in limine citing eight nonexistent cases generated by the firm's internal AI platform, MX2.law.

Attorney Rudwin Ayala used the firm's AI system with prompts including "add to this Motion in Limine Federal Case law from Wyoming setting forth requirements for motions in limine" and "add more case law regarding motions in limine." Without verifying the accuracy of the AI-generated citations, Ayala included them in filings signed by all three attorneys.

Judge Kelly H. Rankin sanctioned Ayala $3,000 and revoked his pro hac vice admission, while supervising attorneys T. Michael Morgan and Taly Goody were each fined $1,000. The court noted that "a fake opinion is not 'existing law' and citation to a fake opinion does not provide a non-frivolous ground for extending, modifying, or reversing existing law."

Butler Snow: High-Stakes Government Representation

Alabama Prison System Defense

The Butler Snow case represents one of the most serious AI-related sanctions to date, involving a high-profile civil rights case. U.S. District Judge Anna Manasco sanctioned three attorneys from Butler Snow—William R. Lunsford, Matthew B. Reeves, and William J. Cranford—for using ChatGPT to generate fabricated case citations in defense of Alabama's prison system.

The case involved an inmate who alleged he was stabbed multiple occasions at the William E. Donaldson Correctional Facility. Attorney Matthew Reeves used ChatGPT to research supporting case law but failed to verify the information before including five false citations in two federal court filings.

Judge Manasco described the conduct as "recklessness in the extreme" and noted that the citations were "completely made up." The sanctions included removal from the case, mandatory disclosure to all clients and opposing counsel, and referral to the Alabama State Bar for disciplinary action.

The High-Stakes Context

This case is particularly significant because Butler Snow represents Alabama in multiple high-profile prison litigation matters, including a Department of Justice lawsuit alleging Eighth Amendment violations. Alabama has paid the firm more than $40 million since 2020, making the professional consequences particularly severe.

Prevention Analysis

The Butler Snow case demonstrates how AI failures can have far-reaching consequences in high-stakes litigation:

Government Representation Standards: Attorneys representing government entities face heightened scrutiny and public accountability, making verification failures more consequential.

Supervisory Responsibility: Bill Lunsford, who signed the filings, admitted he "scanned over the documents" but did not conduct detailed review, highlighting the inadequacy of superficial supervision.

Institutional Impact: The sanctions affected not just individual attorneys but the firm's relationship with a major government client, demonstrating how AI errors can have business-wide consequences.

Eastern District of Texas Claude Sanctions

A lawyer using Claude (an AI tool different from ChatGPT) submitted an unverified brief, resulting in a $2,000 penalty, mandatory CLE participation on AI, and requirements to share the order with clients, opposing counsel, and the court. This case demonstrates that AI-related sanctions extend beyond ChatGPT to other AI platforms.

International Implications: UK High Court Warnings

High Court Justice Victoria Sharp warned that lawyers citing AI-generated fictitious cases risk criminal prosecution and damage to public trust in the justice system. This international development suggests that AI-related professional responsibility issues extend beyond U.S. jurisdictions.

Judicial AI Errors: Withdrawn Rulings

Two federal judges—Henry Wingate (Mississippi) and Julien Neals (New Jersey)—withdrew rulings containing errors such as incorrect party names and fabricated quotes. In the New Jersey case, AI-generated content mistakenly appeared in the judicial decision, demonstrating that AI risks extend to judicial officers as well as practicing attorneys.

Georgia Court of Appeals Reversal

A divorce case was reversed because lower court orders were based on fake legal authority presumably generated by AI, with the husband's attorney sanctioned $2,500. This case demonstrates how AI errors can affect final case outcomes and appellate review.

Expert Witnesses and the Irony of Expertise

The contamination extends to expert testimony. In a particularly ironic case, Stanford Professor Jeff Hancock, serving as an AI misinformation expert for the state of Minnesota at $600 per hour, submitted an expert report containing three nonexistent AI-generated citations created by ChatGPT-4o. The expert on misinformation had himself used misinformation in his testimony about AI dangers.

Even more embarrassingly, when Anthropic faced a copyright lawsuit from Universal Music Group, their own data scientist Olivia Chen used Claude - Anthropic's AI system - to help prepare her expert testimony. Claude created a citation with the wrong title and author for an article

from The American Statistician, prompting the judge to note "there's a world of difference between a missed citation and a hallucination generated by AI."

International Spread and Governmental Failures

The problem has gone global. In Ontario, Canada, attorney Jisuh Lee faced a show cause order for contempt after submitting a legal factum with citations to nonexistent cases, including hyperlinks that led to "404 Error" pages. Israeli prosecutors in a money laundering case cited nonexistent laws in their request to keep a defendant's phone as evidence, earning a judicial scolding after admitting they had used AI hallucinations.

The International Dimension

The crisis extends far beyond American borders, revealing a global struggle with AI's deceptive capabilities. In the United Kingdom, the case of *Ayinde, R v The London Borough of Haringey* sent shockwaves through the British legal establishment in June 2025. Lawyers submitted legal arguments citing five entirely fabricated cases, including one purportedly from the Court of Appeal - one of Britain's highest courts. When confronted, the attorneys denied using generative AI but couldn't identify any legitimate sources for these phantom cases. The UK judge's response was severe, warning that relying on fictitious AI-generated cases could lead to criminal charges. The Bar Council and Courts and Tribunals Judiciary hastily published guidance emphasizing lawyers' absolute responsibility for the accuracy of their submissions.

The Pro Se Predicament

Even unrepresented parties haven't escaped the AI trap. In *Mojtabavi v. Blinken*, decided in December 2024 by U.S. District Court Judge Percy Anderson in California's Central District, a pro se plaintiff repeatedly submitted falsified or inaccurate case citations generated by ChatGPT. The court imposed sanctions, establishing that even self-represented litigants must ensure the accuracy of their legal citations - ignorance of AI's limitations provides no shield.

The Colorado Court of Appeals confronted a similar issue in *Al-Hamim v. Star Heathstone* in October 2024, where another pro se party admitted relying on AI "hallucinations" in his briefing. The court's consideration of sanctions sent a clear message: the absence of legal representation doesn't excuse the submission of fabricated authorities.

The Deepfake Dilemma in Arizona

In May 2025, *State v. Horcasitas* in Arizona Superior Court presented the justice system with an unprecedented ethical dilemma. The victim's family created a deepfake video using AI technology, where an avatar of the deceased delivered a victim impact statement at sentencing. The synthetic recreation used the victim's image and voice profile to deliver a message of compassion and forgiveness, written by the victim's sister.

The ethical complications were immediately apparent. Trial testimony had indicated the victim's aggressive actions immediately before his death - a stark contrast to the forgiving tone of the AI-generated statement. Defense attorneys strenuously objected, arguing that such a deepfake represented an "inauthentic" manipulation of the courtroom process.

While victim impact statements aren't formal evidence, the use of an AI-generated persona of the deceased raised profound concerns about manipulating judicial emotions with synthetic representations. Could artificial recreations of victims influence sentencing decisions? Where should courts draw the line between technology-assisted testimony and outright fabrication?

The judge, while acknowledging the emotional impact of the video, ultimately imposed the maximum sentence, suggesting the synthesized statement hadn't swayed the legal outcome. Yet the incident ignited nationwide discussion about the urgent need for frameworks governing AI-generated evidence in courtrooms.

The Mississippi Mystery

The most troubling development emerged when the judiciary itself became contaminated by AI hallucinations. In July 2025, U.S. District Judge Henry T. Wingate in Mississippi issued a temporary restraining order so riddled with errors that attorneys on both sides were left baffled. The order listed incorrect parties to the suit, included fabricated quotes from state law, and cited cases that appeared to exist nowhere in legal databases.

While Judge Wingate never explicitly confirmed using AI, the nature of the errors - particularly the citation of non-existent cases and the inclusion of facts and parties not present in any court record - bore the unmistakable signature of AI hallucinations. The incident sent shockwaves through the legal community: if federal judges were susceptible to AI-generated fabrications, what did that mean for the integrity of judicial opinions?

After the discrepancies were flagged by bewildered attorneys, Judge Wingate swiftly withdrew the erroneous order and replaced it with a corrected version. The rapid correction, while addressing the immediate problem, only emphasized the crucial need for human oversight at every level of the judicial system.

2025 MIDSOUTH COMMERCIAL LAW INSTITUTE MATERIALS[1]
BANKRUPTCY JEOPARDY

Judges Panel:

Honorable Suzanne H. Bauknight
Chief Bankruptcy Judge, Eastern District of Tennessee

Honorable Jimmy L. Croom
Bankruptcy Judge, Western District of Tennessee

Honorable Nancy B. King
Bankruptcy Judge, Middle District of Tennessee

[1] We gratefully acknowledge and thank our law clerks, Abby Little, Shanna Veach, Deborah Lunn, and Rodd Barckhoff, for their hard work in helping to prepare these materials.

Subchapter V Cases: Examples of Recent Issues

Corporate Discharge:[2]

In a Subchapter V case, consensual confirmation under § 1191(a) results in a discharge under § 1141(d)(1). A corporation's discharge under § 1141(d)(1) after consensual confirmation is not subject to the § 523(a) exceptions. When confirmation occurs under the cramdown provisions of § 1191(b), however, § 1141(d) does not apply. 11 U.S.C. § 1181(c). Instead, § 1192 governs the discharge.

Section 1192(2) provides that the discharge does not discharge any debt "of the kind" specified in § 523(a). Section 523(a) provides that a discharge under § 1192 does not discharge an individual debtor from the 20 categories of debt listed in § 523(a). The issue is whether the nondischargeability exceptions apply when the Subchapter V debtor is not an individual.

Section 523(a) apply only to individual debtors under § 1192(2)	**Section 523(a) applies to individual AND corporate debtors under § 1192(2)**
Spring v. Davidson (*In re Davidson*), No. 23-30018, Adv. No. 23-3005- JCO, 2025 WL 511226, at *5 (Bankr. N.D. Fla. Feb. 14, 2025). *Chicago & Vicinity Laborers' Dist. Council Pension Plan v. R&W Clark Constr., Inc.* (*In re R&W Clark Constr., Inc.*), 656 B.R. 628 (Bankr. N.D. Ill. 2024), *rev'd*, No. 24 CV 1463, 2024 WL 4789403 (N.D. Ill. Nov. 14, 2024). *Nutrien Ag Sols., Inc. v. Hall* (*In re Hall*), 651 B.R. 62 (Bankr. M.D. Fla. 2023), *abrogated by, BenShot, LLC v. 2 Monkey Trading, LLC* (*In re 2 Monkey Trading*), *LLC*, 142 F.4th 1323 (11th Cir. 2025). *BenShot, LLC v. 2 Monkey Trading, LLC* (*In re 2 Monkey Trading, LLC*), 650 B.R. 521 (Bankr. M.D. Fla. 2023), *motion to certify appeal granted*, No. 6:22-BK-04099-TPG, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023), and *rev'd and remanded*, 142 F.4th 1323 (11th Cir. 2025) . *Avion Funding, LLC v. GFS Indus., LLC* (*In re GFS Indus., LLC*), 647 B.R. 337 (Bankr. W.D. Tex. 2022), *rev'd*, 99 F.4th 223 (5th Cir. 2024). *Jennings v. Lapeer Aviation, Inc.* (*In re Lapeer Aviation, Inc.*), No. 21-31500-JDA, Adv. No. 22-3002, 2022 WL 1110072 (E.D. Mich. Apr. 13, 2022).	*Avion Funding, LLC v. GFS Indus., LLC* (*In re GFS Indus., LLC*), 99 F.4th 223, 228 (5th Cir. 2024) (holding that the plain language of § 1192(2) "subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in § 523(a)"). *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC*), 36 F.4th 509, 517 (4th Cir. 2022) (stating that "*all Subchapter V debtors* are textually subject to the discharge limitations described in § 523(a), not just *individual* Subchapter V debtors"). *Chicago & Vicinity Laborers' Dist. Council Pension Plan v. R&W Clark Constr., Inc.* (*In re R&W Clark Constr., Inc.*), No. 24 CV 1463, 2024 WL 4789403, at *7 (N.D. Ill. Nov. 14, 2024). *Marmic Fire & Safety Co., Inc. v. ETG Fire, LLC* (*In re ETG Fire, LLC*), 670 B.R. 884, 903 (Bankr. D. Colo. 2025) (recognizing that although "most bankruptcy courts construing Sections 1192(2) and 523(a) have concluded — based mainly on the preamble to Section 523(a) as well as policy considerations — that the 20 categories (and subparts) of nondischargeable debt under Section 523(a) apply only to individual Subchapter V debtors," in the vast majority of cases, "the analysis used by most bankruptcy courts has not fared well on appeal"). *Christopher Glass & Aluminum, Inc. v. Premier Glass Servs., LLC* (*In re Premier Glass Servs., LLC*), 661 B.R. 939, 943 (Bankr. N.D. Ill. 2024).

[2] For a full discussion of the various bankruptcy court, bankruptcy appellate panel, district court, and circuit court decisions on nondischargeability in Subchapter V cases, *see* Hon. Paul W. Bonapfel, *Subchapter V Update* (Sept. 2024), https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf.

Catt v. Rtech Fabrications, LLC (*In re Rtech Fabrications, LLC*), 635 B.R. 559 (Bankr. D. Idaho 2021). *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC*), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd*, 36 F.4th 509 (4th Cir. 2022). *Gaske v. Satellite Rests. Inc. Crabcake Factory USA* (*In re Satellite Rests. Inc. Crabcake Factory USA*), 626 B.R. 871 (Bankr. D. Md. 2021). *Lafferty v. Off-Spec Sols., LLC* (*In re Off-Spec Sols., LLC*), 651 B.R. 862 (B.A.P. 9th Cir. 2023).	*Ivanov v. Van's Aircraft, Inc.* (*In re Van's Aircraft, Inc.*), No. 23-62260-DWH11, Adv. No. 24-06011-dwh, 2024 WL 2947601, at *6 (Bankr. D. Or. June 11, 2024).

Projected Disposable Income Issue:

One potential area of confusion concerns whether a debtor's plan fails to contribute all of its disposable income without a retroactive "true-up" of actual disposable income.

No True-Up Required or Allowed	**No True-Up Required but Confirmation Allowed on Other Grounds**
In *In re Packet Constr., LLC*, No. 23-10860, 2024 WL 1926345, *1 (Bankr. W.D. Tex. 2024), the court conducted a thorough analysis and ruled that no true-up of actual income versus projected disposable income is required: > [S]ubchapter V does not include a requirement that debtors true up their plan payments if actual income exceeds projected income. There may be circumstances under which a court could determine that the failure to provide actual disposable income, rather than projected disposable income, was not fair and equitable to a non-accepting impaired class of unsecured creditors. But in general, the Court does not believe that a true-up requirement can be imposed on subchapter V debtors. *In re Nelkin & Nelkin P.C.*, 662 B.R. 550, 565–66 (Bankr. S.D. Tex. 2024) ("A retroactive analysis is not one that is estimated or forecasted, as the plain meaning of 'projected' requires. Thus, the plain language of the Code precludes a requirement of a true-up under § 1191(c)(2)(A).")	*Legal Serv. Bureau, Inc. v. Orange Cnty. Bail Bonds, Inc.* (*In re Orange Cnty. Bail Bonds, Inc.*), 638 B.R. 137, 146 (B.A.P. 9th Cir. 2022) ("The Plan does not provide for payment of Debtor's projected disposable income. Instead, it provides for an effective date payment of $432,972.95 and possible payment of an unknown amount from Debtor's actual disposable income. The Plan does not satisfy § 1191(c)(2)(A). . . . But we agree that the Plan satisfies § 1191(c)(2)(B) because the effective date payment is greater than Debtor's projected disposable income for the minimum three-year period required by § 1191(c)(2)."). *Staples v. Wood-Staples* (*In re Staples*), 2:22-CV-157-JES, 2023 WL 119431, *1, 3 (M.D. Fla. Jan. 6, 2023) (allowing true-up over debtor objection).

Other Selected Recent Cases:

●***In re Eng'g Recruiting Experts, LLC*,** No. 3:24-BK-03292-BAJ, --- B.R. ---, 2025 WL 2506031, at *2 (Bankr. M.D. Fla. Sept. 2, 2025):

> This Court will also narrowly construe [*Harrington v. Purdue Pharma*, 603 U.S. 204 (2024)] to find that it prohibits only non-consensual third-party permanent releases as outlined by the Supreme Court "but certainly not temporary third-party injunctions."
>
> . . . .
>
> The Supreme Court did not consider § 1123(a)(5), which the court finds distinguishable from § 1123(b)(6). Section 1123(a) outlines mandatory provisions to be included in a plan, including subsection (5), which states that "a plan shall provide adequate means for the plan's implementation, such as--" and then provides a *non-exhaustive* list of examples. Unlike the catchall provision in § 1123(b)(6), which follows a detailed and descriptive list, § 1123(a)(5) begins with a mandate and includes examples of providing "adequate means for the plan's implementation." In the circumstances at bar, the Plan Injunction is necessary for implementation of the plan and thus is authorized by § 1123(a)(5) in conjunction with § 105. Other courts have also found a temporary injunction like the one here to be necessary "to facilitate the successful implementation of the Plan."

●***In re Fraticelli*,** No. 24-02341 MAG11, 2024 WL 4630093, at *6 (Bankr. D.P.R. Oct. 30, 2024):

> [11 U.S.C. § 1190(3)] specifically permits the modification of claims secured by mortgages on a debtor's principal residence, provided [(1)] that the security interest "was not used primarily to acquire the real property" and [(2)] that the new value was "used primarily in connection with the small business of the debtor."

●***In re Cinemex Holdings USA, Inc.*,** No. 25-17559-BKC-LMI, --- B.R. ---, 2025 WL 2489585, at *5–6 (Bankr. S.D. Fla. Aug. 28, 2025):

> [I]n exercising its discretion, the Court must consider balancing the potential cost of a committee [of unsecured creditors] against the need to protect the interests of creditors; in other words whether the needs of moving the case forward and controlling costs is outweighed by the needs of the creditors. Considering the enhanced role of a Subchapter V trustee, the court determines that the following non-exclusive list of factors should be considered by a court when determining whether there is "cause" to appoint a creditors' committee in a Subchapter V case pursuant to sections 1102(a)(3) and 1181(b):
>
> (a) the size and complexity of the case (whether the case is one which more closely resembles a traditional chapter 11 case);
> (b) the number of creditors involved in the case and the nature of their debt;
> (c) the nature of the debtor's assets;
> (d) the nature of the debtor's business and how it is regulated;

(e) the amount of secured debt, the number of secured creditors, and the nature of the collateral in which such creditors assert a lien;
(f) whether and to what extent any other creditor or other party in interest supports the relief requested;
(g) whether there are any other factors present in the case which, notwithstanding section 1183(b)(2), would interfere with the ability of the Subchapter V trustee to perform his or her normal statutory duties effectively.

•***In re Kearney*,** No. 24-61035-6-PGR, 2025 WL 1949468, at *2 (Bankr. N.D.N.Y. July 15, 2025):

The court concluded that although "Section 363(b) of the Bankruptcy Code provides, in pertinent part, that a debtor-in-possession may use estate property outside the ordinary course of business upon "notice and hearing," a post-petition retainer paid without prior approval of the bankruptcy court was "permissible because [section 328] authorizes it." In so holding, the court recognized:

> Although the Second Circuit has not addressed the interplay between § 328(a) and § 363(b), courts across the country have generally concluded that post-petition retainers are governed by, and permitted under, § 328 (a). *See, e.g.*, *In re Soul Wellness LLC*, No. 24-23368-BKC-LMI, 2025 WL 1213300 (Bankr. S.D. Fla. Apr. 25, 2025) ("The law is clear that the Court has discretion to authorize a post position retainer under 11 U.S.C. § 328(a)."); *In re Golden Fleece Beverages, Inc.*, No. 21B 12228, 2021 WL 6015422 (Bankr. N.D. Ill. Nov. 24, 2021) ("Section 328 'does not modify the word 'retainer' with the adjective 'prepetition.'").

Evidence and Procedure Issues

Selected Recent Cases:

●***Dundon Cap. Partners, LLC v. Ebersol* (*In Re: Legendary Field Exhibitions, LLC*),** No. 19-50900-CAG, 2025 WL 2741471, at *2 (Bankr. W.D. Tex. Sept. 25, 2025) (holding the Rule 11 motion was untimely when filed after final judgment was entered):

> Before analyzing the merits of a Rule 11 motion, the Court must make a preliminary determination of whether the movant complied with the procedural requirements set forth under Rule 11(c)(2). *Askins v. Hagopian*, 713 F. App'x 380, 380–81 (5th Cir. 2018) (per curiam). Failure to comply with Rule 11(c)(2) requirements will result in a denial of sanctions. *Cadle Co. v. Pratt* (*In re Pratt*), 524 F.3d 580, 586 (5th Cir. 2008); *Tompkins v. Cyr*, 202 F.3d 770, 788 (5th Cir. 2002); *Elliot v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995).
>
> . . . . First, sanctions may only be imposed if the offending attorney has "notice and a reasonable opportunity to respond." Fed. R. Civ. P. 11(c)(1); *see Tompkins*, 202 F.3d at 788. Second, the motion "must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service." Fed. R. Civ. P. 11(c)(2) (the "safe harbor provision"); *see Tompkins*, 202 F.3d at 788.
>
> Although Rule 11(c)(2) does not prescribe an explicit time period for the Motion for Sanctions to be filed, the advisory committee notes to the 1993 amendments provide some guidance: "[T]he motion should be served *promptly* after the inappropriate paper is filed, and if delayed too long, may be viewed as untimely." Fed. R. Civ. P. 11(c) advisory committee notes. *Contrast* Fed. R. Civ. P. 11(c)(2), *with* Fed. R. Civ. P. 54(d)(2).

●***In re Harris*,** No. 25-01987-TOM-11, 2025 WL 2682214 (Bankr. N.D. Ala. Sept. 18, 2025) and ***In re Lenzie*,** No. 24-01850-TOM-7, 2025 WL 1748240, at *1 n.5 (Bankr. N.D. Ala. June 24, 2025) ("Pursuant to Rule 201 of the Federal Rules of Evidence, the Court may take judicial notice of the contents of its own files.").

●***In re Dunn*,** No. 18-36566 (KYP), 2025 WL 2315446, at *8 (Bankr. S.D.N.Y. Aug. 11, 2025) (finding that a CPA's testimony did not qualify as expert testimony under the specific facts of the case):

> Expert testimony should be excluded if it is speculative, conjectural or conclusory. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008). "Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony." *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004). "Testimony is properly characterized as 'expert' only if it concerns matters that the average juror is not capable of understanding on his or her own." *United States v. Mejia*, 545 F.3d 179, 194 (2d Cir. 2008). An expert may not testify in the form of a factual narrative based on evidence about which he lacks personal knowledge. *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 45 (S.D.N.Y. 2016). Expert testimony may not usurp "either the role of the trial judge

in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *Nimely* [*v. City of New York*], 414 F.3d [381] at 397 [2d Cir. 2005] (citation and internal quotation marks omitted). Last, expert testimony, like other evidence, is subject to the limitation set forth in Federal Evidence Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) (citation and internal quotation marks omitted).

•***In re McGhee*,** No. CV 25-02646-EG, --- B.R. ---, 2025 WL 2306637, at *10 (Bankr. D.S.C. Aug. 5, 2025) (rejecting as insufficient to establish the business-record exception to the hearsay rule the debtor's evidence that she had downloaded paystubs from an application on her phone):

Under the Federal Rules of Evidence, made applicable in bankruptcy proceedings pursuant to Fed. R. Bankr. P. 9017, records of a regularly conducted activity are an exception to the general rule against the admission of hearsay evidence if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

•***Hamilton v. Dodd* (*In re Dodd*),** No. 24-11276, Adv. No. 25-5028, 2025 WL 1739603, at *3 n.18 (Bankr. D. Kan. June 20, 2025):

"A hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules. The Federal Rules of Evidence do not apply to preliminary injunction hearings." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). The Court makes the findings of fact herein solely for the limited purpose of this Order.

•***In re Diocese of Buffalo, N.Y.*,** 670 B.R. 813, 818 (Bankr. W.D.N.Y. 2025):

Newspaper articles are self-authenticating under Rule 902(6) of the Federal Rules of Evidence. Both sources are appropriately considered under hearsay exceptions for records of regularly conducted activity (*See* Fed. R. Evid. 803(6)) or as statements in ancient documents (*See* Fed. R. Evid. 803(16)).

•***Insight Terminal Sols., LLC v. Cecelia Fin. Mgmt.,*** 148 F.4th 869, 878 (6th Cir. 2025):

Facts: The bankruptcy court refused to recharacterize a loan as an equity contribution when the decedent arranged for one of his family-owned companies to transfer money to another. The decedent died before the trial over whether to recharacterize the loan as an equity contribution. The court excluded the decedent's deposition testimony from the trial because the opposing side lacked the opportunity to cross-examine him.

Analysis. The bankruptcy court erred by reading Fed. R. Civ. R. 32(a) as absolutely barring the use of a deposition if the opposing party lacked an opportunity to cross-examine the declarant. Nothing in the text of Rule 32(a) adopts a categorical cross-examination requirement. To the contrary, the text provides that a deposition "may be used" by a party if the party satisfies the three conditions listed in the rule. Fed. R. Civ. P. 32(a)(1) says:

> (a) Using Depositions.
>
> > (1) *In General.* At a hearing or trial, all or part of a deposition may be used against a party on these conditions:
> >
> > (A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
> >
> > (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
> >
> > (C) the use is allowed by Rule 32(a)(2) through (8).

The rule thus suggests that the party has a "right" to use the deposition once the party proves those conditions. 8A Charles A. Wright et al., Federal Practice and Procedure § 2146, at 645 (3d ed. 2010) (quoting *Wright Root Beer Co. v. Dr. Pepper Co.*, 414 F.2d 887, 890 (5th Cir. 1969)).

•***Burton v. Coney Island Auto Parts Unlimited Inc.* (*In re Vista-Pro Auto. LLC*),** 109 F.4th 438 (6th Cir. 2024), *cert. granted*, 145 S. Ct. 2775 (2025):

Facts: Creditors commenced an involuntary chapter 7 case in November 2014, which was subsequently converted to a chapter 11 case. In February 2015, the debtor filed an adversary proceeding against Coney Island Auto Parts Unlimited Inc. seeking to collect approximately $50,000 in unpaid invoices. The summons and complaint were sent to Coney Island's corporate address but without any corporate officer's or other individual's name on the mailing, as required by Rule 7004(b)(3). After Coney Island failed to respond to the complaint, the debtor moved for default judgment (again, using the same address for service), which the bankruptcy court granted in May 2015. The case was later reconverted to chapter 7, and a trustee was appointed. In April 2016, the trustee sent a demand letter to Coney Island, addressed to its chief executive officer, regarding the default judgment. Although it was undisputed that Coney Island received the letter, the company once again

failed to respond. The trustee continued her efforts to collect on the judgment over the next several years, including placing a hold on Coney Island's bank account.

In October 2021, Coney Island filed a motion to vacate the default judgment in the Southern District of New York. The court denied the motion, instructing Coney Island to seek relief from the Middle District of Tennessee, where the bankruptcy case had been filed. Coney Island did so in July 2022, seeking relief from a void judgment under Rule 60(b)(4). In its motion, Coney Island argued that the debtor's service of the summons and complaint failed to comport with the requirements of Rule 7004(b)(3) and the default judgment was therefore void. Coney Island further argued that the trustee could not invoke laches or any other equitable defense because there is no time limit for filing a motion to vacate a void judgment.

The bankruptcy court denied the Rule 60(b)(4) motion on the basis that it was not made within a "reasonable" time as required by Rule 60(c). The court observed that Coney Island had actual notice of the default judgment no later than April 2016 and its years-long delay in bringing the motion to vacate was unreasonable. The district court affirmed, and Coney Island appealed to the Sixth Circuit Court of Appeals.

Analysis: The majority opinion of the Sixth Circuit affirmed, holding that the "reasonable time" requirement in Rule 60(c) applies to judgments that are void due to a lack of personal jurisdiction. The majority concluded that its reading of Rule 60(c)(1) was the "only reading that is faithful to the text . . . which, by its plain terms, imposes a reasonable-time requirement on *each* of the enumerated grounds in Civil Rule 60(b)." *Id.* at 444.

The majority also observed that a "reasonable time" limitation comports with basic equitable principles, preventing a party from "consciously sleep[ing] . . . on its rights in order to cause prejudice to the judgment holder, undermine the finality of long-forgotten judgments, or upset reliance interests." *Id.* Finally, the majority stated that its interpretation was not unfair to the party subject to a void judgment because the "reasonable time" limitation "anticipates a fact-specific inquiry that can account for a variety of circumstances, including a party's innocent delay in learning of a void judgment against it or in learning why the judgment is void." *Id.* at 445-46.

Dissent: In his dissent, Judge McKeague asserted that courts do not have the power to enforce void judgments:

> "Principles of due process require that parties to a lawsuit be properly served for a court to have jurisdiction to adjudicate the parties' rights. Indeed, before "a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." Without proper jurisdiction over the parties, a judgment is void under [Civil] Rule 60(b)(4). Because a court lacks the power to enforce a void judgment, "overwhelming authority exists for the proposition that there are no time limits with regards to a challenge to a void judgment." Because a void judgment is a "nullity," the argument goes, the passage of time cannot render it valid.

Id. at 448 (internal citations omitted).

Cert. Granted: The Supreme Court granted a *writ of certiorari* on June 6, 2025, and oral argument is scheduled for November 4, 2025. This appeal will allow the Supreme Court to resolve a circuit split[3] and hopefully address the conflict between the text of Rule 60(c) and the principles of due process.

[3] The Sixth Circuit opinion split with the First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits, each of which has held that there is no time limit for seeking relief from a void judgment. *See U.S. v. One Toshiba Color Television*, 313 F.3d 147, 157 (3d Cir. 2000); *Rodd v. Region Constr. Co.*, 783 F.2d 89, 91 (7th Cir. 1986); *U.S. v. Boch Oldsmobile Inc*., 909 F.2d 657, 661-62 (1st Cir. 1990); *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir. 1993); *Katter v. Arkansas La. Gas Co.*, 765 F.2d 730, 734 (8th Cir. 1985); *Owens-Corning Fiberglass Corp. v. Center Wholesale Inc.* (*In re Center Wholesale Inc.*), 759 F.2d 1440, 1448 (9th Cir. 1985); *Misco Leasing Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir. 1971); *Hertz Corp. v. Alamo Rent-a-Car Inc.*, 16 F.3d 1126, 1130-31 (11th Cir. 1994); *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962).

AI and Other Ethical Issues

Selected Recent Cases:

•***In re Harris*,** No. 25-01987-TOM-11, 2025 WL 2682214, at *2 n.7 (Bankr. N.D. Ala. Sept. 18, 2025):

> The Court is using the term "argued" to reference statements and allegations made by the Debtor in open Court. At first the Debtor read from a piece of paper then began to read from his phone. Shortly thereafter, the Court questioned him about the source of what he was reading on his phone. The Debtor testified that he researched the information that he was providing to the Court and then put the information into ChatGPT, which the Court understands to be a form of artificial intelligence, to organize the information for him. Once the Court noted potential flaws or failings of artificial intelligence, the Debtor stopped reading from his phone.

•***In re Whitehall Pharmacy LLC*,** No. 25-12406, --- B.R. ---, 2025 WL 2556097, at *6 *(*Bankr. E.D. Ark. Sept. 3, 2025*)*:

> The Court withdrew a show cause order requiring a law firm and two of its attorneys to show cause why they should not be sanctioned for citing nonexistent authority in a first day motion. By taking appropriate remedial action, an Arkansas law firm avoided sanctions for including a phantom case citation generated by artificial intelligence in a motion.
>
> > Counsel is responsible for their negligence and misplaced reliance on AI, but there is no indication—and this court does not believe—that they purposely misled the court. . . . Misplaced reliance or negligence can mitigate consequences to the extent the proof or self-evident facts demonstrate a lack of intent to actively mislead the court.

•***Richburg v. Glyndon Square LLC* (*In re Richburg*),** No. 25-1297-EG, Adv. No. 25-80037-EG, --- B.R. ---, 2025 WL 2470473, at *1, 5 (Bankr. D.S.C. Aug. 27, 2025):

> Finding that an attorney unjustifiably relied on AI-generated content, a bankruptcy judge issued the sanction to "serve as a 'lesson learned' for the bar in general of the potential consequences of uninformed reliance on generative AI in legal practice." According to the attorney's explanation, he had used Microsoft's Copilot generative AI platform to draft pleadings and to find case citations without verifying the citations. The court found that Rule 9011(b) requires the signer of a bankruptcy document to make a reasonable inquiry to determine that the filing of the document is supported by the facts and the law and is not made for an improper purpose. The judge did not issue monetary sanctions but found the sanctions should be limited to "what is sufficient to deter repetition of the conduct or deter comparable conduct by others."

•***Graham v. Mascio* (*In re Mascio*), No. 25-10631, Adv.** No. 25-1157 TBM, 2025 WL 2434832, at *15 (Bankr. D. Colo. Aug. 22, 2025) (stating that a debtor who uses AI "is cautioned that the use of artificial intelligence for research whether by attorneys or pro se parties is subject to Rule 11 compliance and the failure to ensure a citation is existent and stands for the proposition for which it is cited may be sanctionable").

•***In re Derosa-Grund*,** No. 25-80235, 2025 WL 2395095 (Bankr. S.D. Tex. Aug. 18, 2025) (concerning a pro se debtor's use of AI in pleadings):

> This case is notable in that a provision is included in Westlaw (as do other cases that list the hallucinated cases cited by parties):
>
> > **Editor's Note:** This decision contains citation references that are incorrect or do not actually exist. These invalid citations appeared in the original court opinion and have been preserved as written since they are part of the official record. Any links to these invalid citations have been removed.
>
> The court entered a conditional dismissal order. One of the conditions of re-filing by the *pro se* debtor required "the Debtor, if she files any pro se pleadings in the future, to attach copies of all cases cited with the relevant quotes highlighted." *Id.* at *6.

•***Xu v. Nasser* (*In re Nasser*),** No. 25-44069, Adv. No. 25-04091, 2025 WL 2382055, at *2 n.3 (Bankr. E.D. Mich. Aug. 15, 2025):

> Plaintiffs filed a Notice of Errata Regarding Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss that purported to correct certain errors in the Response. The Court noted:
>
> > It is difficult for the Court to understand how such errors could be made. The Court is concerned that Plaintiffs may have used generative artificial intelligence to assist in drafting the Response. The Court discourages such a practice for reasons that should now be well known by all attorneys. The Court will not take any action at this time other than to warn counsel that future errors of this nature will not be tolerated.

•***In re Martin*,** 670 B.R. 636, 648 (Bankr. N.D. Ill. 2025) (citations omitted) (sanctioning a law firm for use of hallucinated citations even after admission of the error and correction, finding: "The bottom line is this: at this point, no lawyer should be using ChatGPT or any other generative AI product to perform research without verifying the results. Period.").

Consumer Issues

Selected Recent Cases:

•***Sweet v. Majors Law PLLC* (*In re Shastal*),** No. 20-31468-jda, Adv. Nos. 24-3033-jda, 24-3076-jda, 2025 WL 2670336 (Bankr. E.D. Mich. Sept. 17, 2025):

> A consumer bankruptcy law firm was suspended from practice in a Michigan bankruptcy court and ordered to pay a fine approximating the fees it received in 220 cases in which a bankruptcy judge found violations of attorney fee reporting rules. The court found that the Nevada-based law firm "consistently and continually violated its mandatory disclosure obligations." Despite multiple court orders putting the firm on notice regarding its improper disclosures, the firm continued to file noncompliant documents. Finding that the firm had a "clear and consistent pattern or practice of violating § 526," the judge suspended the firm from soliciting or filing new cases in the district for three years and ordered it to pay a civil penalty of $392,471.[4]

•***In re Wayne Leonard Bins,*** No. 19-22677 (W.D. Tenn. June 13, 2025) (Hagan, J.):

> **Facts:** The debtor filed a Chapter 13 bankruptcy in April 2019, and the confirmed plan provided for payments on a mortgage loan held by U.S. Bank Trust, including pre-petition arrears and ongoing monthly payments. After the trustee completed all plan payments, she filed a Notice of Final Cure in July 2024. Initially, the creditor responded by claiming that a post-petition balance remained due but later amended its response to state the mortgage was current. Months later, however, the creditor filed an amended proof of claim asserting new amounts due for two payments from 2019, prompting the debtor to seek a court determination.
>
> **Analysis:** The court's analysis centered on Federal Rule of Bankruptcy Procedure 3002.1, which is designed to ensure transparency and finality in mortgage-related claims in Chapter 13 cases. Specifically, Rule 3002.1(g) requires the mortgage creditor to file a detailed response to the trustee's notice of final cure within 21 days, accurately stating whether the debtor has paid all required amounts. The court emphasized that inaccurate or incomplete responses undermine the rule's purpose—to prevent surprises at the conclusion of a bankruptcy case.
>
> The court held that the creditor's amended response to the final cure notice, which stated the mortgage was fully current, became the binding final accounting. The creditor's subsequent amended claim for GAP payments—asserting new debts from early in the case—violated Rule 3002.1(g) because the creditor had not itemized those amounts in its required response. Citing a body of case law treating inaccurate Rule 3002.1(g) responses as equivalent to no response at all, the court held the creditor's amended claim was barred under Rule 3002.1(i)(1). The court also awarded attorney's fees to the debtor for prosecuting the motion, finding that the creditor's failure to comply with the rule caused unnecessary legal expense.

[4] *See also In re Recovery Law Grp., APC*, 670 B.R. 193 (Bankr. E.D. Va. 2025) (suspending the same law firm as in *In re Shastal* from practice in the Eastern District of Virginia).

•***In re Lenzie,*** No. 24-0850-TOM-7, 2025 WL 1748240 (Bankr. N.D. Ala. June 24, 2025) (Mitchell, J.):

Facts: The debtor filed for Chapter 7 bankruptcy, listing a home secured by a loan from Central State Bank. The bank obtained stay relief during the bankruptcy, foreclosed on the property, and filed an ejectment action in state court after the debtor's discharge but before the case was closed. The debtor filed counterclaims in the state court action. The bank later sought to reopen the bankruptcy case, requesting surrender of the property and cessation of state litigation.

Analysis: The court noted that reopening a closed bankruptcy case under § 350(b) is discretionary and requires a showing of cause, considering factors such as the benefit to creditors or the debtor, prejudice to affected parties, alternative forums for relief, and the time elapsed since the case was closed. Central State Bank had already chosen to pursue state court remedies after obtaining relief from the stay and foreclosure. In *Renasant Bank v. Sanchez*, Case No.: 5:24-cv-01746-RDP, 2025 U.S. Dist. LEXIS 56280, 2025 WL 923470 (N.D. Ala. Mar. 26, 2025), a nearly identical case involving the same creditor's attorney, both the bankruptcy and district courts rejected efforts to reopen a case that was already the subject of ongoing and appropriate state court proceedings.

The bankruptcy court reasoned that Central State Bank had not only failed to present new evidence or compelling circumstances but also tried to withdraw its motion without explanation after an adverse ruling in the state court. The court found no meaningful distinction with *Sanchez* and concluded that equitable considerations favored allowing the state court to resolve the remaining issues. Because the relief sought could be obtained in state court, and the bank had essentially abandoned its motion, the bankruptcy court denied the motion to reopen.

•***In re Dowdall,*** No. 24-42950, 2025 WL 1823666 (Bankr. E.D. Tex. July 2, 2025):

Facts: The bankruptcy court granted the debtor's motion to dismiss a dischargeability complaint filed by the creditor because it was untimely under Federal Rules of Bankruptcy Procedure 4004(a) and 4007(c). The complaint was filed one day after the § 727 discharge objection deadline. The creditor failed to secure an extension before the deadline and later sought equitable relief, which the court denied. The court held that neither equitable grounds nor procedural exceptions justified the late filing.

Analysis: The court emphasized that deadlines under Federal Rules of Bankruptcy Procedure 4004(a) (objections to discharge under § 727) and 4007(c) (dischargeability objections under § 523) are strictly construed. Although the Chapter 7 trustee had successfully moved to extend the § 727 deadline, *the creditor had not joined or moved for its own extension before the deadline expired*. The creditor's later motion to extend under Rule 4004(b)(2) was denied because it failed to meet the required criteria, and the court rejected arguments for equitable relief under § 105(a).

The court followed the reasoning in *In re McCain* 652 B.R. 678 (Bankr. E.D. Tex. 2023), and *Yaquinto v. Ward* (*In re Ward*), 978 F.3d 298 (5th Cir. 2020). In those cases, the courts emphasized that equitable exceptions to Rule 4004 are not permitted unless a court error occurred, which was not alleged. Rule 9006(b)(3) limits extensions to those specifically authorized by Rule 4004. In short, because the complaint was untimely and amendment would be futile, dismissal with prejudice under Rule 12(b)(6) was appropriate.

- ***United States v. Miller,*** 604 U.S. ---, 145 S. Ct. 839 (2025):

Facts. On March 26, 2025, the United States Supreme Court decided *United States v. Miller*, resolving a circuit split and holding that in an action brought under § 544(b), § 106(a)'s sovereign immunity waiver applies only to the § 544(b) claim itself and not to any state-law claims nested within the federal bankruptcy claim.

In *Miller*, the bankruptcy trustee of a Utah-based business whose shareholders misappropriated and transferred to the IRS approximately $145,000 in company funds to satisfy personal federal tax liabilities filed an "avoidance" suit under § 544(b) against the United States, seeking to claw back the misappropriated funds. The trustee cited Utah's fraudulent transfer statute.

Analysis. Under § 544(b), a trustee may avoid certain transfers that would be "voidable under applicable law"—that is, voidable outside of bankruptcy proceedings. 11 U.S.C. § 544(b)(1). Section 544(b) requires a trustee to identify an actual creditor capable of voiding the transfer at issue under "applicable law." That actual-creditor requirement – which restricts the universe of transactions a trustee can invalidate – is unique to § 544(b).

Ordinarily, the federal government's sovereign immunity would bar any suit against it under Utah law. But the Bankruptcy Code contains a sovereign-immunity waiver, § 106(a), that abrogates the government's sovereign immunity "with respect to" § 544. But the *Miller* Court held that § 106(a)'s sovereign-immunity waiver applies only to the § 544(b) claim itself and not to any state-law claims nested within that federal claim. "Section 106(a) is properly understood as a jurisdictional provision that empowers courts to hear § 544(b) claims against the Government to the extent such claims are otherwise available under state law; it does not alter the substantive meaning of § 544(b)'s 'applicable law' clause."

- ***Hayward v. U.S. Dep't of Educ.* (*In re Hayward*),** 655 B.R. 458 (Bankr. W.D. Tex. 2023):

Facts: Prior to filing bankruptcy, the debtor-plaintiff obtained twenty-seven student loans between August 1979 and August 2017. He filed his bankruptcy petition on March 5, 2019. On June 14, 2019, the court entered an order granting the debtor a general discharge; the case was closed on June 17, 2019. In August and September 2022, the debtor received consolidation loans from DOE in the total amount of roughly $480,000. The debtor admitted that his student loans were consolidated in September 2022.

Analysis. The court noted that § 727(b) provides in part: "Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that *arose before the date of the order for relief under this chapter* . . . ." 11 U.S.C. § 727(b) (emphasis added). The court concluded: "Because the undisputed evidence shows that: (1) the Consolidation Note was executed after the date the [debtor] filed his bankruptcy petition, and (2) the proceeds of the Consolidation Loans were disbursed after the date the [debtor] filed his bankruptcy petition, the Consolidation Loans are new and distinct post-petition student loans that cannot be discharged under 11 U.S.C. § 727(b)." *Id.* at 463 (citations omitted).

FILING IN STYLE: Surviving (and Thriving in) Bankruptcy Court

Best Practices from the Clerk's Perspective

Mid-South Commercial Law Institute
46th Annual Seminar
December 4 & 5, 2025

Presenters:

Mac Halcomb
Clerk of Court(ret.)
U.S. Bankruptcy Court
Northern District of Alabama

Vanessa A Lantin
Clerk of Court
U.S. Bankruptcy Court
Middle District of Tennessee

Bankruptcy court isn't typically known for glamor – but that doesn't mean you can't navigate it with precision, confidence, and yes, even a bit of style. This presentation is designed to equip you with some information you may find helpful to not just survive filing your case and getting it before the judges with the least alterations necessary but also to thrive in this area of practice.

We will walk through some key points in the procedures and highlight some common mistakes (and how to avoid them). Along the way, you'll find practical insights and tips that go beyond the basics – helping you stand out as a prepared, professional, and polished participant in bankruptcy matters.

Bankruptcy may be stressful – but your approach to it doesn't have to be. We will cover some general information on rules and filing statistics for the courts in the mid-south and then touch on some areas that may need special attention.

Statistics

Based on the filing statistics over 12 months ending June 30, 2025, bankruptcy filings overall are trending up, slowly. Nationally, filings increased by 11.5%. The following table details the filings for the same time for the courts in the Mid-South.

Jurisdiction	Total Bankruptcy Filings		
	2025	2024	% change
Alabama Northern	9,946	9,493	4.8
Alabama Middle	6,073	5,600	8.4
Alabama Southern	3,712	3,500	6.1
Arkansas Eastern & Western	6,685	6,563	1.9
Georgia Northern	19,892	18,825	5.7
Georgia Middle	6,157	5,954	3.4
Georgia Southern	3,462	3,885	-10.9
Kentucky Eastern	5,659	4,969	13.9
Kentucky Western	5,730	5,916	-3.1
North Carolina Eastern	4931	4157	18.6
North Carolina Middle	2,007	2,007	0.0
North Carolina Western	2,292	2,040	12.4
Mississippi Northern	4,317	3,937	9.7
Mississippi Southern	5,070	4,748	6.8
Tennessee Eastern	7,012	6,744	4.0
Tennessee Middle	5,374	4,924	9.1
Tennessee Western	8,396	8,011	4.8

The Rules – Federal Rules of Bankruptcy Procedure and Local Rules of Court

Just as in sports and life, rules shape the play. In bankruptcy court, the rules are not just guidelines but lay the foundation for the strategy in every case. Rules coupled with the statutes give us the framework to keep everything on track.

The Federal Rules of Bankruptcy Procedure are carefully crafted and thoughtfully amended with input from the public (bar, academics, and others) to assist in implementing the law. The next part sets out the rule changes scheduled and proposed to become effective in the next two years, and those out for public comment.

Rule and Form Changes (effective December 1, 2025):

Rule 3002.1 allows assessment of a mortgage claim's status while a chapter 13 case is pending to give debtors an opportunity to cure any post-petition defaults. The change to the Rule re-orders some subparagraphs:

- 3002.1(f)(1) is now 3002.1(g)(1). The prior deadline of 30 days has been replaced. The new deadline is 45 days.
- 3002.1(g)(1) is now 3002.1(g)(3). The prior (g)(1) deadline of 21 days is now 28 days.
- 3002.1(h) is now 3002.1(g)(4)(a). The prior deadline of 21 days is now 45 days under (g)(4)(a).

There are 6 new official forms associated with this rule:

  - 410C13-M1 Mtn to determine status of mortgage claim.
  - 410C13-M1R Response to Trustee's/Debtor's Mtn
  - 410C13-N Trustee's Notice of Payments Made
  - 410C13-NR Response to Trustee's Notice of Payments Made
  - 410C13-M2 Motion to Determine Final Cure and Payment of Mortgage Claim
  - 410C13-M2R Response to Trustee's/Debtor's Motion to Determine Final Cure and Payment of the Mortgage Claim

And the courts will be providing guidance on how filers should be submitting these forms in the CM/ECF system – so check local court websites.

Finally, Official Form 410S1 is amended to create a new Part 3 for the annual HELOC Notice and existing part 3 becomes part 4.
https://www.uscourts.gov/forms-rules/pending-rules-and-forms-amendment/pending-or-recent-changes-bankruptcy-forms

The change to **Rule 8006** clarifies that a party to the appeal may file a request that a Court of Appeals authorize a direct appeal.

Proposed Rule Changes (planned effective date December 1, 2026):

There is a proposed new rule 7043 and amendments to eight other rules: 1007, 2007.1, 3001, 3018, 5009, 9006, 9014, 9017. The changes to the rules can be grouped and described as follows:

Currently, **Rule 3018(c)** requires that acceptance of a plan in chapter 9 or 11 case be in writing. The amendments to **Rule 3018** authorize a court to also treat as an acceptance of a plan a statement on the record by a creditor or the creditor's attorney or authorized agent. This would apply to individual creditors, who may be acting pro se, as well as to a creditor's attorney or agent.

The amendments to **Rules 9014 and 9017** along with the **new Rule 7043** are intended to provide bankruptcy courts greater flexibility to authorize remote testimony in contested matters that can typically be resolved less formally and more expeditiously by means of a hearing. In contrast to adversary proceedings where this is not the case. The distinction the amendments make are to allow a court to authorize remote witness testimony in a contested matter "for cause and with appropriate safeguards", requiring the court to continue using the "for good cause in compelling circumstances and with appropriate safeguards" standard for authorizing remote witness testimony in adversary proceedings.

The amendments to **Rules 1007(c), 5009(b), and 9006(b) & (c)** are intended to reduce the number of individual debtors whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation upon completion of the course. The amendment to Rule 1007 eliminates deadlines for filing the certificate of course completion and the amendment to Rule 9006 eliminates provisions concerning court alteration of those deadlines. The amendment to Rule 5009 provides for two notices reminding the debtor of the need to take the course and file the certificate; currently there is only one notice.

Finally, the changes to **Rules 2007.1** and **3001** are of a technical nature and correct erroneous references within the rules made when the Federal Bankruptcy Rules were restyled.

Proposals out for Comment (planned effective date December 1, 2027):

Rule 2002 Notices proposed amendment to paragraph (o) is as follows:

> "(o) Caption. The caption of a notice given under this Rule 2002 must include the information that Form 416B requires. The caption of a debtor's notice to a creditor must also include the information that § 341(c) requires."

The proposed amendment to Official Form 101 Voluntary Petition for Individuals Filing for Bankruptcy adds language in Part 1, Section 4: "EIN (Employer Identification Number) issued

to you, if any. Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition." The remainder of Form 101 remains unchanged.

The proposed amendment to Official Form 106C provides space to indicate a total of the specific-dollar exemption amounts and for the total value of the debtor's interest in property for which exemptions are claimed. Specifically, the changes to Official Form 106C Schedule C: The Property You Claim as Exempt – Part 1, Sections 2.1 and 2.2 to "add spaces for providing the total amount of column BN – current value of the portion of property owned by the debtor – and of column C – amount of the exemption claimed. In adding up the exemption amounts claimed in column C, the debtor should include only those exemptions claimed in specific dollar amounts." Committee Note, May 12, 2025 Report of the Advisory Committee on Bankruptcy Rules available at:
https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf The comment period on these proposed amendments closes February 16, 2026. Any comments may be posted to the regulations.gov portal.

Local Rules

To do justice to the local rules of court in the seventeen districts within the Mid-South would take over a large portion of this presentation. Without going into deep detail for each and every district, it is important to note that while the Federal Rules give a framework, the local rules are typically much more specific to the practice in a given district.

When asked what some important practice tips are, clerks of court will often cite the local rules. Always double check local court websites for updated rules, standing orders, and procedures. This can be especially important when filing or participating in cases outside the usual district. Think of it like the saying "measure twice, cut once" – just because you've filed in a district before, doesn't mean things haven't changed. If it has been a while since you have participated in a case in a district, staying up to date with the local rules helps avoid mistakes and ensures everything goes smoothly.

Practice Tips

In the next sections, certain areas of procedure will be detailed. Before we get to those items however, there are a few quick tips that we would highlight here:

- While clerk's office staff is precluded from giving legal advice, we are always happy to answer procedural questions or help steer you in the right direction however we can. Everyone is always happier when filings are tendered correctly the first time.
- Make sure you are admitted to practice before the bankruptcy court. This requires admission in the district court. You may use pro hac vice procedures if you are not qualified to be admitted to the district court. There are courts and sometimes

specific matters that do not require local counsel. Specifics are on the respective court websites.

- Make sure to review the court's website on a regular or timely basis (depending on where you are filing). The website is the courts' primary means of public-facing communication. In addition to the local rules, the website of each court provides procedural guidance, Administrative Orders for specific aspects of procedure, and other helpful tips for filing in the district. Check the website for chambers specific information – some judges have very detailed guidance.
- In pleadings, include citations for Code Sections and Bankruptcy Rule numbers (both federal and local, if appropriate) upon which you are relying for the relief you are seeking.
- Review your caselaw and citations, especially if you have an AI assist in drafting. Courts in some cases are providing specific guidance on AI use and there has been a lot of discussion around hallucination citations. Relying on the AI without due diligence and proofing can make an unfortunate difference in the result of the proceedings.
- If you are new to the district and time permits, visit the court on a general docket day it can give you a general sense of how the proceedings go. Be sure to introduce yourself if your matter is your first time before a judge. Also, if you have someone standing in for you, make sure they are prepared.
- Read the notices and orders from the court and make sure you follow the instructions and deadlines. Deficiency notices are the roadmap to have pleadings addressed appropriately. Call the Clerk's office if you believe an order was issued in error. Ignoring the order could result in a show cause hearing or dismissal of the contested matter, AP, or case.
- Make sure to properly name the documents you are filing (e.g., First Amended Preconfirmation Plan, Second Corrected Amended Plan, etc.). Incorrect or unclear titles can make it difficult to follow the trail in the docket and can obscure the relief you are seeking.
- Evidence submission is also an area where the local websites can provide guidance. Be sure to follow the court's procedures on how to get the evidence properly submitted in advance of the hearing. Some courts have an online submission process and others still favor evidence binders. If you plan on using some digital forms of evidence ensure you know about the technological limitations and requirements.
- Courtroom Deputies (CRD) run the docket and will assist in continuances or answering your question as to whether you need to attend.

Proposed Orders

Attorneys submit proposed orders either with the initial filing, if required or appropriate, or at the direction of the court after the hearing. One overarching tip is that the title of the order should be equally as clear as the underlying motion. However, also here, courts have different processes. For example, the northern district of Alabama has email boxes set up

for order submission, while the middle district of Tennessee uses an e-orders program built into the ECF system. What follows is details for the process in the northern district of Alabama which has four staffed courthouses: Anniston, Birmingham, Huntsville, and Tuscaloosa. Each courthouse has a judge in residence and each judge has an Eorders email box for submission of proposed orders. Information about the Eorders box and other helpful information may be found on the court's website, www.alnb.uscourts.gov/judges-information. Information from the website is as follows:

Submitting Orders

- To submit an order to the Court, you must email the order to:

For Judge Crawford	ordersDSC@alnb.uscourts.gov
For Judge Henderson	ordersJHH@alnb.uscourts.gov
For Judge Jessup	ordersCRJ@alnb.uscourts.gov
For Judge Mitchell	ordersTOM@alnb.uscourts.gov
For Judge Robinson	ordersJJR@alnb.uscourts.gov

- The order must be sent as an attachment to the email and must be in MS Word format, NOT a PDF file. For security reasons, the order should not be macro-enabled.
- Include the debtor's BK or AP case number when naming the proposed order file, i.e. "19-041104 Greene Order" or "AP16-70021 Veros Order".
- Consent orders must list the party(ies) consenting to the order.
- The subject line of the email should include:
  1) 12-digit case number in its entirety (ex. 19-41101-JJR13),
  2) Debtor(s) Last/Business Name(s) or AP short title, and
  3) Short description of the type of order submitted, for example-
     - Agreed Order
     - Consent Order
     - Order Granting Motion to Modify
     - Order on Motion to Avoid Lien
     - Order and Ntc of Hrg
     - Proposed Order on MFR
     - Settlement Agreement

  Examples:

  Subject: 18-04177-TOM11, Mission Coal, Agreed Order

  Subject: 18-0387-DSC13, Taylor, Proposed Order on Chase MFR

  Subject: AP 16-70021-JHH Veros Energy, LLC v. GCube, Consent Order

  Subject: AP 19-80016-CRJ Spencer v. Credit Adjustments, Dismissal Order

Attorneys' failure to submit proposed orders are handled differently throughout the three Alabama districts.

- Anniston – when the Courtroom Deputy (CRD) receives notification that the matter is settled, a docket entry is made: "*the proposed order is due to be submitted by the close of business 14 days from the date of this note, otherwise the case administrator will enter an order dismissing the document. If additional time is needed to submit the order, the parties should file a written request in CM/ECF on or before said deadline. (The deadline for submission of the order cannot be extended by email request or by telephone request).*"
- Birmingham – the clerk's office does not monitor orders to be submitted unless the failure to submit is holding up paying a claim. Then a docket event is entered requesting submission of an order within 10 days. If the order is not received, notice sent to chambers for instructions. APs are monitored more closely. An inactive AP list is generated each month.
- Huntsville – the clerk's office does not monitor whether attorneys submit orders in chapter 7 or 13 cases. However, the circumstances of the case may require a follow up if there is a related matter affected by the failure to submit an order. Example – Order Approving Motion to Reopen or Order Converting Case from Chapter 7 to Chapter 13. Outstanding orders in APs are monitored and chambers is notified of non-compliance. This usually results in an Order to Show Cause being issued. There is an administrative order that may be enforced.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

In the Matter of:
Procedural and Administrative Matters

Administrative Order No. 22-01
Northern Division Only

AMENDED ADMINISTRATIVE ORDER REQUIRING PROPOSED ORDERS TO BE SUBMITTED TIMELY UNDER PENALTY

IT IS HEREBY ORDERED that, effective May 16, 2022, unless otherwise directed, a party must submit a proposed order within twenty days following a hearing where the Court approved the relief requested, via e-mail to ordersCRJ@alnb.uscourts.gov. The proposed order must be submitted in Microsoft Word format. If a proposed order is not timely submitted, it will not be accepted for entry by the Court, absent excusable cause.

IT IS SO ORDERED this the 11th day of May, 2022.

Clifton R. Jessup, Jr.
United States Bankruptcy Judge

- In Tuscaloosa, case managers track orders that are due on matters allowed on negative notice. If the order is not submitted timely, an email is sent to chambers,

often resulting in a docketing of a deficiency notice giving the attorney 3 days within which to provide the proposed order. After the expiration of 3 days, an order may be entered denying the relief.

Like the middle district of Tennessee, the middle and southern districts of Alabama use the E-Orders program in CM/ECF.

On the website for the middle district of Alabama under the "Attorney Resources" tab is a 10-page "how to" manual regarding the requirements. Don't forget to also review the information under the respective judge's chambers as they have a wealth of information regarding the court's expectations and requirements. For example, if a proposed order is not submitted within the proscribed period (Judge Creswell's Chambers Procedures sets out a 14-day limit) a show cause order is entered.

In the southern district of Alabama, the clerk's office does not track order submissions. The judge may deny the relief if the order is not submitted – it is up to the judge.

Bankruptcy Administrator – United States Trustee

A unique aspect to the Mid-South region is that Alabama and North Carolina are the only two states with Bankruptcy Administrators (BA) rather than US Trustees (UST). The BA system was retained as two influential senators at the time, Sen. Howell Heflin (AL) and Sen. Jesse Helms (NC), insisted that the debtors and the system in their states would be better served by the BA system than the U.S. Trustee system. The BAs are under the Judicial Branch and are appointed by the respective Circuit Cout of Appeals (11th and 4th Circuits). A BA is appointed for a 5-year term and depending on the volume of cases, has an office to assist in the administration of the cases in the district. In contrast, the UST is a part of the Executive Branch, Department of Justice and is appointed by the Attorney General.

The BA and UST have oversight over the chapter 7, chapter 11, SubV, and chapter 13 standing trustees. While the UST appoints all of these trustees, the BA maintains a panel of chapter 7 trustees and maintains a pool of SubV trustees. However, the court appoints chapter 12 and 13 standing trustees. The BA may assist the court with advertising for vacancies for standing trustees and, where appropriate, make a recommendation. The BA may also move for the appointment of a Chapter 11 trustee or recommend one where the court orders that a chapter 11 trustee is necessary.

The BA performs virtually the same duties that the UST performs, such as review of petitions for dismissal under 707(b) for abuse, including means testing review, and review of debtor's transactions with their attorneys regarding fees charged. The BA facilitates 341 hearings including how they are conducted, safekeeping recordings, and obtaining interpreters. The BA reviews Chapter 7 trustees asset cases, including banking, final reports, and distributions made to creditors. They also provide much of the oversight over chapter 11 cases, including solicitation for and formulation of creditor committees, conducting 341

hearings, case monitoring, and recommendation on fees. They also make referrals to the FBI or U.S. Attorney in cases of suspected bankruptcy fraud. Some of the BAs in Alabama are trained mediators and offer their services for free in bankruptcy related matters.

The BA for the Northern District is Thomas Corbett and has four divisional offices, each with a BA attorney. The website is www.alnba.uscourts.gov. The attorney will be able to provide you with answers prior to filing a chapter 11 case. They also may give you insights to the judge.
Contacts are as follows:
ALNBA – Eastern Division (Anniston) – Robert Landry (256) 741-1525.
robert_landry@alnba.uscouts.gov.
Northen Division (Huntsville) – Richard Blythe (256) 340-2743
richard_blythe@alnba.uscourts.gov
Southern Division (Birmingham) – Jon Dudeck (205) 714-3840
jon_dudeck@alnba.uscourts.gov
Western Division (Tuscaloosa) – Scott Allums (205) 561-1695
scott_allums@alnba.uscourts.gov

ALMBA – Danielle Greco – (334) 954-3900
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Staff Attorney Sarah Bruce
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NCWBA – Shelley Abel (704)350-7587
shelley_abel@ncwba.uscourts.gov
Staff Attorney Heather Culp
Heather_Culp@ncwba.uscourts.gov

Chapter 11

The Bankruptcy Administrator (BA) and U.S. Trustee (UST) offices also play a big role in the Chapter 11 cases. If anticipating filing a Chapter 11, it is advisable to contact the BA's office and discuss general procedures in advance of the filing with that division attorney. This discussion can help to learn about what they need to facilitate creditor committee solicitation, how they handle DIP banking, including 345 requirements, and how they view multiple debtor cases, including quarterly fee expectations. While the UST has a list of approved banks, the BA does not. They have depository agreements with several banks.

Once the filing has been prepared, the next call in a complex or large case should be to the clerk's office to give them a heads up on the filing. You will not be given any hearing dates, however, until the case is filed. It is important to note on the filings that there are affiliated cases or debtors as the hearings will be intertwined. In your initial filings, file your Motion for Use of Cash Collateral. If you are seeking expedited hearings, these should be coordinated with the courtroom deputy, and the court will do its best to get you a hearing as soon as possible.

Attend the first hearing in-person. The judge and the orders of the court will guide you as to whether you may appear by phone or video thereafter. File your Application to Employ Professionals, including yourself, as soon as possible.

Sub V cases:

Judge Bonapfel has authored a free primer on Sub V cases titled *A Guide to the Small Business Reorganization Act of* 2019 and available on the GANB website. https://www.ganb.uscourts.gov/complex-chapter-11-procedures. He has also authored *Top 15 Features of New Subchapter V* and has provided two updates, 2022 and 2024.

In Alabama, the BA recommends debtor's counsel escrows $1,000 per month so that the Sub V Trustee will get paid.

Sub V was created to speed up chapter 11 procedures and make the process cheaper overall. If the plans are not timely filed, it drags the process out and can impact confirmation.

Unclaimed funds procedures

The source of unclaimed funds are trustee payments that do not reach the creditor or the debtor and are held by the court (and ultimately the Treasury) for the benefit of the original intended recipient. Bankruptcy Rule 3011 was amended to require that each bankruptcy court's website provide access to information regarding funds deposited with the clerk's office. As part of this access, many courts have a webpage on their website that provides the procedure and information about unclaimed funds generally. Many courts also provide links

to an Unclaimed Funds Locator; a database listing all the unclaimed funds held. We will walk through the specifics for obtaining unclaimed funds in Alabama Northern and Tennessee Middle.

Alabama Northern:

In Alabama Northern the link to the unclaimed funds information on the website is: https://www.alnb.uscourts.gov/unclaimed-funds.

Under paragraph I there is a direct link to the "Unclaimed Funds Locator." You can enter a nationwide search on behalf of you, your firm, your client, or a creditor or debtor. The information on the website has the forms and information as to what is required to claim the funds.

Per the local rules, the process in Alabama Northern is a paper only system requiring wet signatures, preferably in blue ink and with unredacted governmental issued photo I.D. The court does not accept electronic filings for unclaimed funds.

A copy of the application is served on the U.S. Attorney for the district and the prior claim holder if the claim has been assigned. Often the claimant will send the original to the U.S. Attorneys Office rather than the clerk's office. In this case, the claimant will need to complete the documents again and send the originals to the Bankruptcy Court Clerk's Office.

The underlying case does not need to be reopened to process the claim. The attorney does not have to be admitted to the Northern District of Alabama to make application. Therefore, pro hac vice motions not required. Corporate entities do not need to hire counsel to proceed and pro se applicants are encouraged. Omnibus applications are encouraged if a claimant has unclaimed funds in multiple cases in the same court. Maybe most important, there is no fee required to file the application.

The Clerk's Office staff typically verifies notary information on the Secretary of State's website and reviews applicable information on Lexus/Nexus. If the address on the application is different from that on the I.D., the claimant will need to provide an affidavit indicating reason for the variance or a copy of a utility bill verifying current address. If the owner of record's name has changed since the funds have been deposited with the court, then proof of name change must also be provided.

If a successor claimant is filing the application, documentation sufficient to establish chain of ownership or transfer of claim from the original owner of record is needed. If the application is from a funds locator, proposed changes to the court's procedures suggest making the payment payable to both the locator and the original claimant.

If, after all this investigation, an error is made or information is incomplete, either a deficiency notice will be sent or contact made indicating what information is needed to cure.

This sounds like a lengthy process but the court's procedures have proven to be necessary. Examples of fraudulent or suspicious attempts in the northern district of Alabama include:

- Lexus/Nexus indicated the claimant was deceased and the photo on license did not match the photo on license in the debtor's counsel's file.
- An attorney filed an application on behalf of a debtor. Research indicated that attorney was retired. He made an appearance by phone and stated he had not filed the application and the debtor also showed up for the hearing.
- An entity filed a transfer of claim in closed cases and then filed an application for the funds.
- A person created an entity substantially similar in name of a defunct creditor/entity then made a claim for the funds.

The practice in the Northern District of Alabama is that if it is suspicious, ask the judge to set for hearing.

Once an application is granted, an appeal time of 14 days must expire before payment is processed.

Middle District of Tennessee:

The unclaimed funds guidance in the Middle District of Tennessee is available from links on the court's main webpage and available at: https://www.tnmb.uscourts.gov/unclaimed-funds-rules-and-guidance

Similar to Alabama Northern, Tennessee Middle also has a link to the "Unclaimed Funds Locator" under paragraph I on the information page. However, in this district the process is available via motion and may be filed electronically. The motion may be filed in the case where the unclaimed funds came from but if the case is closed it does not need to be reopened in order to file the Motion for unclaimed funds.

Staff in the clerk's office will vet the application similar to the process in Alabama and if anything appears off, the file will be set for a hearing or further handling by the responsible judge.

2025 Chapter 7 Case Law Update

46th Annual Mid-South Bankruptcy & Commercial Law Institute Seminar

December 5, 2025

Presented by:

Honorable Nicholas Whittenburg, Erica Johnson, and Phillip Young

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JURISDICTION

The Probate Exception

Gold v. Williams (In re Williams), 2025 U.S. App. LEXIS 2934, 2025 WL 454925 (6th Cir. Feb. 7, 2025).

The one that recognized the narrow scope of the "probate exception" to subject matter jurisdiction.

In a nonprecedential opinion, the Sixth Circuit explained the narrow scope of the probate exception to the subject matter jurisdiction of federal courts. An individual chapter 7 debtor did not schedule his home when listing his assets. He maintained that his deceased wife had owned the home and that she had transferred the home to their children before her death. The trustee filed an adversary proceeding against the children contending the home was property of the estate because title passed to the debtor (prepetition) upon his wife's death under Michigan's intestacy statutes. The children argued that the court lacked subject matter jurisdiction, relying on the probate exception and that, in fact, their mother executed a quitclaim deed whereby she transferred the property to them prior to her death. The bankruptcy court rejected the jurisdictional argument and found that the deed was fake and entered judgment for the trustee. The children appealed.

The district court reversed holding that the probate exception applied and, therefore, the bankruptcy court lacked subject matter jurisdiction. The district court reasoned that the resolution of the trustee's adversary proceeding required the bankruptcy court to apply Michigan's intestate succession laws which are reserved exclusively to the state's probate courts. The trustee appealed.

The Sixth Circuit reversed. The court noted that the "probate exception" is "of distinctly limited scope" applying in only three circumstances: (1) when the federal court is asked to probate a will; (2) when the federal court is asked to annul a will; and (3) when the federal court is asked to assert jurisdiction over property to which the probate court has custody. The court found that none of those circumstances were present. In this case, there was never a probate proceeding pending and, accordingly, no probate court was exercising *in rem* jurisdiction over the home. In short, the fact that state law of intestate succession may define the bankruptcy estate's interest in property does not deprive a bankruptcy court of subject matter jurisdiction.

As an interesting side note, before the district court reversed the bankruptcy court's decision finding that the probate exception applied, the bankruptcy court awarded the trustee sanctions in the amount of $805.00 against the children's attorney finding that his argument that the court lacked subject matter

jurisdiction was frivolous. After the district court reversed, the children's attorney sought reconsideration of the award of sanctions. The bankruptcy judge held the matter in abeyance pending a ruling by the Sixth Circuit on the trustee's appeal. After the Sixth Circuit reversed the district court's decision in favor of the bankruptcy court's decision, the bankruptcy court denied the motion to reconsider the sanctions award. In its order denying the motion, the bankruptcy judge stated "[t]he Sixth Circuit's recent decision only bolsters this Court's conclusion that attorney Warr's filing and prosecution [of the motion] based on the 'probate exception' was frivolous. It was clearly contrary to binding Sixth Circuit case law, as was the district court's decision reversing this Court." *See Gold v. Williams (In re Williams),* 667 B.R. 346 (Bankr. E.D. Mich. 2025).

BARTON DOCTRINE

Juravin v. Ryan, 2024 U.S. App. LEXIS 28043, 2024 WL 4677417 (11th Cir. Nov. 5, 2024).

The one where judicial immunity swallowed the *ultra vires* exception to the *Barton* doctrine.

The FTC initiated proceedings against an individual and his companies alleging that they violated several consumer protection laws in connection with the marketing and selling of weight-loss products. The litigation resulted in a judgment of $25,246,000 and an injunction precluding the individual from engaging in certain deceptive trade practice. The individual filed a voluntary chapter 7 petition but refused to cooperate with the chapter 7 trustee. At the request of the trustee, the bankruptcy court entered a "Break Order" that allowed the trustee and his counsel to seize the debtor's business records, electronic communication devices containing information about the debtor or his business interests, his wristwatch collection and "any additional items Trustee, in his sole discretion, reasonably believes to be part of the bankruptcy estate." The trustee and his attorneys, with the assistance of the U.S. Marshalls, went to the debtor's home and seized numerous electronic devices and several boxes of documents.

About five months after the seizure, the debtor's spouse, Anna, filed suit in the district court alleging that the trustee and his counsel seized her personal documents and effects which were unrelated to the debtor's bankruptcy—thereby converting her property and violating her right to privacy. The defendants moved to dismiss the complaint for lack of subject-matter jurisdiction. The district court granted the motion finding that the *Barton* doctrine precluded jurisdiction over the lawsuit because Anna had not obtained leave of the bankruptcy court to file the suit.

Anna appealed arguing that the *Barton* doctrine did not apply to her claim because the trustee and his counsel improperly seized property unrelated to the bankruptcy estate. The 11th Circuit agreed with her.

The court easily found that the *Barton* doctrine presumptively applied because the defendants were court-appointed, or court-approved offices, and the defendants were acting in their official capacity when enforcing the "Break Order." However, the 11th Circuit held that the *Barton* doctrine's *ultra vires* exception applied. This exception applies if, by mistake or wrongfully, the receiver takes possession of property belonging to another. The court reasoned that if a trustee is exercising control over property that isn't estate property, he is acting outside his authority to collect and liquidate property of the estate. The 11th Circuit, nevertheless, affirmed the dismissal of the complaint finding that the trustee and his counsel enjoyed judicial immunity stating that "[t]hat immunity applies even if a bankruptcy trustee acts in error, maliciously, or in excess of the appointing court's jurisdiction." In sum, the court found that the trustee was acting in his official capacity when enforcing the "Break Order" and, therefore, enjoyed judicial immunity, but outside the scope of his authority when mistakenly exercising control over property that is not property of the estate. Applying the court's reasoning, it appears that judicial immunity might swallow the *ultra vires* exception to the *Barton* doctrine. The moral of the story for trustee's is to always get a court order.

Jordan v. Beskrone (In re Prehired LLC), 2025 WL 1549911 (Bankr. D. Del. May 30, 2025)

The One Where You Can't Sue the Trustee Without Permission

The Debtors filed for bankruptcy under Chapter 7. The Plaintiff was required to seek and obtain leave of the bankruptcy court before commencing the District Court Action against the Chapter 7 trustee and his counsel under the Barton Doctrine. The Barton Doctrine, established by the U.S. Supreme Court in *Barton v. Barbour*, requires that a plaintiff must obtain leave from the bankruptcy court before instituting a suit against a bankruptcy trustee for acts taken in the trustee's official capacity. The Third Circuit Court of Appeals has extended the application of the Barton Doctrine to bankruptcy trustees in In re VistaCare Grp., LLC. Therefore, a Chapter 7 trustee enjoys a considerable level of immunity from suits when acting in furtherance of their statutory duties.

The Plaintiff, the former CEO of the Debtors, admitted to withdrawing $74,000 from a debtor bank account after the bankruptcy cases were converted to Chapter 7 and transferring the funds to another entity (FourLetter, LLC), which spent the money. The Trustee sent demand letters to the Plaintiff, stating that the withdrawal was unlawful and demanding the return of the funds. Instead of returning the funds, the Plaintiff filed a lawsuit against the Trustee and his counsel in the U.S. District Court for the District of Delaware without first seeking leave from the Bankruptcy Court.

The court found that the Plaintiff violated the Barton Doctrine by commencing the District Court Action without first obtaining leave from the Bankruptcy Court, determining that the District Court

Defendants acted within the scope of their official capacities in demanding the return of funds that were property of the bankruptcy estate, which the Plaintiff had unlawfully withdrawn. Therefore, the claims asserted in the District Court Action were barred by the Barton Doctrine and the Bankruptcy Court denied the Plaintiff's Motion for Comfort and Motion for Leave to pursue claims.

BAD FAITH

In re Perch at Overbrook, LLC, 664 B.R. 701 (Bankr. D.S.C. 2024*)*

The one where filing to establish venue in a particular state is crafty, but not bad faith.

Two individuals owned two South Carolina businesses (LLCs) equally 50/50, a brewery and a restaurant. When the businesses failed, the individuals moved out of state—to Colorado. The brewery filed a chapter 7 petition in South Carolina.

While the brewery case was pending, the individuals were preparing to file their own chapter 7 petitions in South Carolina. Before they could do so, however, the chapter 7 trustee abandoned property of the estate, and the court immediately entered a final decree and closed the case.

So, still wanting venue for their individual cases to be in South Carolina, the individuals filed a chapter 7 for their failed restaurant in South Carolina. The restaurant submitted the required schedules and statements and disclosed that a bank had acquired all the assets of the company within a year of the petition date. There was over $700,000 scheduled for unpaid rent, and the debtor disclosed that the case would likely be a no-asset case.

When the US trustee questioned why the case was filed, the debtor’s attorney responded that the case was filed to create venue (under 28 U.S.C. § 1408(2)) in South Carolina for the soon-to-be-filed individuals’ personal bankruptcies.

The US trustee moved to dismiss the case as a bad faith filing because of a lack of a bankruptcy purpose. While that motion was pending, the individuals filed their personal bankruptcy petitions in South Carolina.

The court worked through several factors about what constitutes bad faith and found that the US trustee did not satisfy the high burden of demonstrating a bad faith filing. Even though the restaurant could not receive a discharge, the court was not concerned that it filed knowing it had no assets to be distributed.

In re Simon, 666 B.R. 289 (Bankr. M.D. Pa. 2025)
The One About Bad Faith and Sixth-Time Bankruptcy Dismissal

The United States Trustee's filed a motion to dismiss debtor's Chapter 13 petition pursuant to 11 U.S.C. §707(a) and/or §707(b)(3)(B) claiming he acted in bad faith. Debtor is retired and had a monthly income from social security and retirement benefits. As debtor moved to extend the automatic stay, the mortgage servicer objected claiming he was only filing to delay foreclosure and could not cure the pre-petition mortgage arrears or perform under the Chapter 13 plan. Debtor then moved to convert his case to a Chapter 7, but his expenses on the Schedule J drastically changed. The mortgage servicer's relief from the automatic stay was granted to continue foreclosure proceedings.

The UST argued that under § 707(b)(3)(B), that debtor's monthly expenses were excessive and unreasonable, and he bore the burden of proving abuse. The Court accepted the argument by applying the IRS standard of housing which showed debtors was too costly. This increased his net income to fund a Chapter 13 plan, so the filing in this case and the attempt to obtain a Chapter 7 discharge was abuse.

Looking at for cause dismissal under § 707(a), the Court clarified that "Once a party calls into question a petitioner's good faith, the burden shifts to the petitioner to prove his good faith." *See In re Marks*, 174 B.R. 37, 40 (Bankr. E.D. Pa. 1994) (*citing In re Sky Group Int'l, Inc.*, 108 B.R. 86, 90 (Bankr. W.D. Pa. 1989). Debtor had previously filed 5 prior cases that were dismissed, his mortgage debt was 96.40% of his debt, he provided no documents to support any of his expenses or the increase therein, and never completed the plan payments in his prior cases. Under the totality of the circumstances, the Court found this 6th bankruptcy filing was not in good faith.

The Court granted the motion to dismiss and barred debtor from refiling another bankruptcy petition for 180 days.

In re Jackson, No. 24-22894, 2025 Bankr. LEXIS 26 (Bankr. W.D. Tenn. Jan. 6, 2025*)*
The one where the chapter 7 trustee must have a reason to object to the chapter 13 conversion.

Debtor filed a voluntary Chapter 7 petition, and two months later filed a Motion to Dismiss or Convert Case to Chapter 13 under § 707(a) which the Trustee objected. Under the schedules, Debtor's expenses slightly exceeded her after tax income. The Trustee offered no evidence to establish the value of Debtor's home nor rebutted her evidence of the disrepair of her home.

The Court clarified that "prejudice or delay occurs when dismissal of the case would negatively affect a creditor's rights against the debtor" and the balancing factors include: "(1) whether all of the creditors have consented; (2) whether the debtor is acting in good faith; (3) whether dismissal would result in a prejudicial delay in payment; (4) whether dismissal would result in a reordering of priorities; (5) whether there is another proceeding through which the payment of claims can be handled; and (6) whether an objection to discharge, an objection to exemptions; or a preference claim is pending." Debtor bears the burden to prove cause and lack of prejudice for dismissal.

No creditors objected, no evidence of bad faith was presented, debtor's only asset to liquidate was her home which the sale would result in no proceeds available for distribution, and the Trustee did not show how dismissal would be prejudicial to other creditors. In converting her case, debtor must show this is the first time she has converted and that she qualifies for Chapter 13. The Court evaluates the conversion by applying "the same bad faith (or lack of good faith) standard used in evaluating dismissal or conversion by a non-debtor under subsection 1307(c) because denying conversion is as harsh as dismissal under chapter 13—disallowing the debtor from proposing a plan to pay their debts over time."

> To determine whether the debtor has acted in bad faith, courts consider the totality of circumstances and examine a list of factors:
>
> (1) [T]he debtor's income; (2) the debtor's living expenses; (3) the debtor's attorney fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the debtor has petitioned for relief under Chapter 13; (6) the debtor's potential for future earning; (7) any special circumstances the debtor may be subject to, such as unusually high medical expenses; (8) the frequency with which the debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by debtor as indicative of the debtor's sincerity to repay the debt; (11) the burden which administration would place on the trustee; and (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the debtor.

In construing bankruptcy policy in favor of the Debtor and weighing all factors besides her income and expenses in her favor, there was no evidence that debtor's conversion constituted bad faith.

Taleb v. Lewis (In re Kramer), No. 24-1269, 2025 U.S. App. LEXIS 2256 (6th Cir. Jan. 29, 2025)

The one where a state court litigant does not get a second bite at the apple to litigate disputes in the bankruptcy court.

Plaintiff obtained an arbitration award against Debtor, but before he could enforce it, Debtor filed for personal and business bankruptcy in a Chapter 7 petition. Plaintiff's attorney put a lien on his award, and the Michigan State Court ordered Debtor's estate to pay the attorney his unpaid fees using the bankruptcy distributions owed to Plaintiff and hold the remainder in escrow. Plaintiff also objected to UST's

application for compensation, but this was overruled as Plaintiff provided no evidence for objecting to the fee application.

Title 11 U.S.C. § 704(a)(9) provides that bankruptcy trustees appointed in Chapter 7 cases "shall . . . make a final report and file a final account of the administration of the estate with the court and with the United States trustee." Under Federal Rule of Bankruptcy Procedure 5009(a), once such a report is filed and, unless the United States trustee or a party in interest files an objection to the report within thirty days, the estate "is presumed to have been fully administered." Once the thirty days have elapsed and after any objection is dealt with, the bankruptcy court may close the case. 9 Collier on Bankruptcy ¶ 5009.01 (Richard Levin & Henry J. Sommer eds. 16th ed. 2024). Plaintiff was deemed a creditor with an actual pecuniary interest in the outcome of the proceedings, a party in interest. *See Zipkin Whiting, Co. v. Barr* (*In re Felix*), 825 F. App'x 365, 367 (6th Cir. 2020); *Morton v. Morton* (*In re Morton*), 298 B.R. 301, 306-07 (B.A.P. 6th Cir. 2003).

Plaintiff argued that the proceeding was filed in bad faith, that the UST's fees were unreasonable and unnecessary, and that his attorney had been unjustly enriched. Firstly, Plaintiff never filed a motion to dismiss under 11 U.S.C. § 707(b)(1), so he cannot file a bad faith argument. Secondly, Plaintiff did not properly lodge an objection to the fees as he only challenged those earned by the UST's counsel which were previously overruled and never validly appealed. Lastly, regarding the unjust enrichment claim, the proper channel for litigating that would have been in the state court, so the Court would not review the collateral attacks in the bankruptcy appeal.

JUDICIAL LIEN AVOIDANCE

In re Mirabal (Bankr. D.N.M. Dec. 2, 2024)

The one where the court expanded *Law v. Siegel* and held that its own inherent powers under § 105 cannot be used to circumvent the Code, even in cases of fraud.

Creditors obtained judgment liens in the amount of $400k+ for fraud and recorded them. The chapter 7 debtors sought to avoid these liens pursuant to § 522(f) because they impaired their homestead exemption. Creditors argued the court had power to deny debtor's motion to avoid the liens because the liens secure claims that arose from debtors' fraud. The court relied *on Law v. Siegel*, which stands for the proposition that the Bankruptcy Code does not confer upon the courts power to deny exemptions based up on a debtor's bad faith conduct. Likewise, the court reasoned that the only requirements for lien avoidance are found in the statutory requirements set forth in § 522(f): the existence of a judicial lien, the lien's impairment of the homestead exemption, and those debtors possessed the homestead property when the lien

attached. The court did note, however, that the defrauded creditors have a remedy under §523(a)(2), which is to have their debts declared non-dischargeable. The court's comment does beg further questions; what does collection look like in a practical sense if a lien is avoided but the debt is not discharged? Could a subsequent lien be filed after the case completes?

In re Dulaney, 666 B.R. 178 (Bankr. S.D. Ohio 2024)

The one where neither a consent judgment nor a forbearance agreement were enough to create a security interest out of a judicial lien.

Debtor personally guaranteed a loan for his business. Later, the creditor obtained a $9 million consent judgment and recorded it against his principal residence. Debtor and creditor entered into a forbearance agreement which halted collection activities so long as debtor made the delineated payments, but did not prevent creditor from recording the lien. Debtor filed his chapter 7 case and sought to avoid the lien pursuant to § 522(f) because it impaired his homestead exemption. Creditor opposed the avoidance of their lien, arguing that they had a security interest in the property and not a judicial lien.

Creditor first argued that because the judgment was a consent judgment that it was not actually obtained by judgment of the court and therefore did not meet the definition of a judicial lien. To determine whether the lien was a judicial lien or a security interest, the court focused on the events that led to the lien's creation. Applying the 7th Circuit's causation test and various other cases holding that liens created by stipulation, confession, or consent are still judgment liens so long as the underlying agreement itself does not create a lien, the court found that creditor's lien was a judicial lien. Second, the creditor argued that the forbearance agreement weighed in favor of a security interest rather than a judicial lien. Again, the court disagreed. The court held that nothing in the forbearance agreement showed that debtor expressly and voluntarily agreed to a lien; rather the agreement's own language evinced that creditor had a judgment lien when it stated that agreement did not prevent creditor from recording its lien under state law. The court held that the lien was avoidable as a judicial lien.

Gramigna v. Roumeliotis (In re Gramigna), No. 24-50464 (JAM), 2024 Bankr. LEXIS 3054 (Bankr. D. Conn. Dec. 20, 2024)

The one where the court held that a mortgage deficiency judgment is avoidable as a judicial lien under § 522(f).

A chapter 7 debtor sought to avoid a consensual mortgage deficiency judgment as an exception to avoidance under § 522(f)(2)(C), claiming it was a judicial lien that could be avoided. The court noted case law is divided on whether a mortgage deficiency is a judgment arising out of a mortgage foreclosure. Creditor argued that the judgment was part and parcel of the mortgage foreclosure action and could not be

avoided. Debtor argued that deficiency judgments are state law remedies on the note, not the mortgage; and that Congress' purpose for § 522(f) was to benefit debtors. The debtor also argued that the stipulated/consent judgment for the deficiency weighed in favor of a judicial lien because it was a judgment entered by the court. Ultimately, the bankruptcy court agreed with debtor (and notably the 6th Cir. BAP), holding that the mortgage deficiency did not arise out of the foreclosure action and therefore was a judicial lien which could be avoided. See *In re Pace*, 569 B.R. 264 (B.A.P. 6th. Cir. 2017).

In re Portch, Nos. Chapter 7 Proceedings, 2:23-bk-02120-DPC, 2025 Bankr. LEXIS 218 (Bankr. D. Ariz. Feb. 5, 2025)

The One About Avoiding Post-Petition Judgment Liens Under § 522(f)

The court addressed whether a debtor could avoid a post-petition, nondischargeable judgment lien under 11 U.S.C. § 522(f) in light of Arizona's increased homestead exemption following Proposition 209. The debtor claimed a $400,000 homestead exemption after Arizona voters raised the exemption cap from $250,000 to $400,000. The creditor, holding a pre-petition judgment later determined to be nondischargeable, recorded its judgment as a lien against the debtor's homestead after the bankruptcy petition was filed. The creditor argued that § 522(f) did not apply to post-petition liens, especially for nondischargeable debts, and that the lower, pre-Prop 209 exemption should control due to the proposition's saving clause. The court held that it had jurisdiction to decide the lien avoidance motion, that § 522(f) permits avoidance of post-petition judicial liens even if the underlying debt is nondischargeable, and that the $400,000 exemption applied because the creditor's lien rights did not "mature" until after Prop 209's effective date. The court granted the debtor's motion to avoid the lien to the extent it impaired the homestead exemption up to $400,000, clarifying that the saving clause did not limit the exemption in this context.

In re Romo, 668 B.R. 661 (Bankr. D.N.M. 2025)

The one where the Debtors get a second bite at the apple to claim homestead exemption after waiving in state court foreclosure action.

The first issue was whether the Debtors are precluded from avoiding North Mill Credit Trust's (NMCT) judicial lien under 11 U.S.C. § 522(f) by their failure to claim a homestead exemption in the Property in prepetition state court proceedings which resulted in a default foreclosure judgment that Debtors waived the right to a homestead.

Second, if Debtors are not precluded from avoiding the judicial lien under § 522(f), what is the applicable homestead exemption amount?

Married Debtors filed a voluntary Chapter 7 petition on the Petition Date. They claimed a homestead exemption in the Property under NMSA 1978, § 42-10-9(B)(1) (effective July 1, 2023) in the amount of $210,000. NMCT obtained a default judgment against the Debtors for $82,112.78 plus interest, recording a Judicial Lien against the Property. NMCT initiated a foreclosure action, and the state court entered a Default Foreclosure Decree. Debtors did not file a claim of exemption in the Foreclosure Action. The bankruptcy filing stayed the foreclosure sale, so Debtors retained ownership of the Property on the Petition Date.

Upon filing a voluntary bankruptcy petition, a debtor may claim exemptions in property that, absent allowance of the exemption, would be property of the bankruptcy estate under § 541. Debtors claimed New Mexico exemptions. The state law exemptions available under § 522(b)(3) are those exemptions "applicable on the date of the filing of the petition." Further, the Petition Date is the operative date for determining a debtor's exemption rights.

The Court concluded that Debtors waived the homestead exemption in the Foreclosure Action with respect to foreclosure of NMCT's Judicial Lien; however, Section 522(f)(1) specifically authorizes lien avoidance "notwithstanding any waiver" of the homestead exemption. Under this provision, Debtors are not precluded from avoiding NMCT's Judicial Lien even though they waived the homestead exemption by failing to assert it in the Foreclosure Action as required under New Mexico law. Debtors are entitled to an allowed homestead exemption in the Property of up to $150,000 each, for a total of $210,000.

The Court concluded that even though under New Mexico law Debtors waived their right to claim a homestead exemption in a prepetition state court foreclosure action, Debtors are entitled to an allowed homestead exemption in their bankruptcy case and are not precluded from seeking to avoid NMCT's judicial lien under § 522(f) as impairing the homestead exemption. The Court also concluded that Debtors may claim in their bankruptcy case the increased homestead exemption amount available under New Mexico law in effect as of the Petition Date, notwithstanding New Mexico law to the contrary with respect to foreclosure of NMCT's Judicial Lien. The Court overruled NMCT's and the Chapter 7 Trustee's objections to Debtors claimed homestead exemption, fixing Debtors' allowed homestead exemption at $210,000.

AUTOMATIC STAY

Dawson v. Ram Motors, LLC (In re Dawson), 665 B.R. 796 (Bankr. S.D. Ohio 2025)

The one where the failure to obtain relief from the stay before repossessing vehicle is a violation of the automatic stay.

RAM Motors obtained repossession title for a vehicle the Debtor owed and currently possessed. Debtor filed a Chapter 7 petition but never received notice of the change in title to the vehicle under the defaulted terms of the security agreement. RAM Motors repossessed the vehicle without requesting relief from the automatic stay. Debtor filed a motion for summary judgment requesting damages for RAM Motors's alleged willful violation of the stay including turnover of the vehicle, and damages for RAM Motors's alleged violation of state laws.

Under Ohio law, RAM Motors repossession title did not give them all the legal and equitable interests in the vehicle as Debtor retained equitable title including possession and the right to redeem. Thus, her equitable rights in the vehicle brought Debtor's interest in the vehicle into the bankruptcy estate under 11 U.S.C. § 541. The Court then goes on to distinguish *City of Chicago v. Fulton* where the creditor impounded the debtors' vehicles before the debtors filed their bankruptcy petitions. 592 U.S. at 157. In this case, Debtor retained possession of the vehicle which in turn violated the automatic stay. Because RAM Motors knew of the bankruptcy filing through the § 341 Meeting of Creditors, their repossession amounted to a willful violation of the stay under § 362(k).

The Court granted Debtor's request for return of the vehicle, actual damages, punitive damages, and reasonable attorney fees.

In re Alexander, 2025 WL 853859 (Bankr. S.D.N.Y. Mar. 18, 2025)

The one where the pharmacy creditor fails to fill the sanction prescription and forced to refill it again.

After Debtor filed for bankruptcy, Proscript Pharmacy violated the automatic stay by sending collection statements to the Debtor, despite having received notice of the bankruptcy filing. The debtor's attorney notified Proscript of the violation, but Proscript continued its collection efforts. As a result, the Debtor filed a motion for contempt and sanctions against Proscript for willful violation of the automatic stay under 11 U.S.C. § 362(k) and 105(a).

The bankruptcy court found Proscript in contempt and awarded the debtor $5,445 in actual and punitive damages, including attorneys' fees. When Proscript failed to pay the ordered sanctions, the Debtor

filed a second motion seeking additional sanctions for noncompliance. The court addressed whether its prior sanctions order was a "money judgment" enforceable by writ of execution under Federal Rule of Civil Procedure 69(a)(1), or whether contempt proceedings were the proper enforcement mechanism. The court held that sanctions orders for misconduct, such as those under § 362(k), are not ordinary money judgments but are instead orders protecting the integrity of the court's processes and thus are properly enforced through contempt proceedings.

The court granted the Debtor's request for additional attorneys' fees incurred in prosecuting the second contempt motion, awarding $3,987, but denied the request for further punitive damages, holding that punitive damages are not available under the court's inherent sanctioning authority (as opposed to those expressly provided by statute). The decision clarifies that bankruptcy courts may use contempt proceedings to enforce sanctions orders for violations of the automatic stay, rather than requiring debtors to pursue writs of execution, and that punitive damages are limited to those circumstances expressly authorized by statute.

H. Okorie v. R. Lentz (In re H. Okorie), No. 24-60377, 2025 U.S. App. LEXIS 4374 (5th Cir. Feb. 25, 2025)

The One Where the Foreclosure Wasn't Totally Void

H. Okorie v. R. Lentz (In re H. Okorie) involved Dr. Ikechukwu H. Okorie and his medical practice, Inland Family Practice Center, LLC, who collectively filed three bankruptcy cases, each involving secured lender PriorityOne Bank, which held a lien on commercial property used for Inland's clinic (the "Clinic Property"). In Dr. Okorie's second individual Chapter 11 bankruptcy case, which was later converted to Chapter 7, PriorityOne foreclosed on the Clinic Property post-petition without first obtaining relief from the automatic stay. The bankruptcy court later granted PriorityOne's motion for *nunc pro tunc* annulment of the automatic stay to April 17, 2019, thereby validating the foreclosure. The district court affirmed the bankruptcy court's order, and the Fifth Circuit affirmed the district court's decision. The court noted that actions taken in violation of the automatic stay are voidable, not void, because the bankruptcy court has broad authority under § 362(d) to annul the automatic stay both prospectively and retroactively. Relief from the stay may be granted for "cause" under § 362(d)(1), or if the debtor does not have equity in the property and the property is not necessary to an effective reorganization under § 362(d)(2).

The court found that the bankruptcy court did not abuse its discretion in retroactively annulling the stay under both statutory grounds. For § 362(d)(1), "cause" included the lack of adequate protection of PriorityOne's interest as a secured creditor. Inland had failed to make required adequate protection payments in a prior case, and Dr. Okorie did not dispute the lack of adequate protection in his response to PriorityOne's motion. For § 362(d)(2), the court found that Dr. Okorie lacked equity in the Clinic Property because

PriorityOne was an undersecured creditor. Once PriorityOne established it was undersecured, the burden shifted to Dr. Okorie to prove the property was necessary for an effective reorganization. However, neither Dr. Okorie nor Inland were making payments on the property and Inland was preparing to vacate it, making foreclosure inevitable. The court also considered equitable principles under "exceptional circumstances," noting Dr. Okorie's attorney acknowledged no stay, Inland abandoned equipment, and both Chapter 11 plans recognized the foreclosure. Given the annulment, the court found it unnecessary to address Dr. Okorie's arguments regarding a willful violation of the automatic stay or the fairness of the foreclosure process

In re Steward, 668 B.R. 203 (Bankr. N.D. Ill. 2025)
The One With the Judgment, the Bankruptcy, and the Annulled Stay.

Debtor, who was sued by Plaintiff after a car accident, resulting in an $827,868 judgment against Steward. Steward appealed the judgment, arguing that the trial court improperly excluded expert testimony and failed to instruct the jury on contributory negligence. While the appeal was pending, Steward filed for Chapter 7 bankruptcy. Unaware of the bankruptcy filing, the Illinois Appellate Court proceeded to reverse the judgment and remanded the case for a new trial, finding that the expert's testimony should have been admitted. United Equitable Insurance Company (UEIC), Debtor's insurer, had a financial interest in the outcome and later sought relief from the bankruptcy court.

The central legal issue was whether the Illinois Appellate Court's order reversing the judgment violated the automatic stay imposed by 11 U.S.C. § 362(a), and if so, whether the bankruptcy court could retroactively annul the stay to validate the appellate decision. The bankruptcy court found that the appellate order was indeed issued in violation of the automatic stay, as it constituted a continuation of an action against the debtor. However, the court also held that it had the discretion under § 362(d)(1) to retroactively annul the stay. The court determined that cause existed for annulment because there was no hardship to Steward or her bankruptcy estate, maintaining the stay would be unjust and ignore the appellate court's decision, and UEIC, as the insurer, had standing as a party in interest.

The bankruptcy court granted UEIC's motion to retroactively annul the automatic stay as to the Illinois Appellate Court's order, making the appellate decision valid and effective as of the bankruptcy petition date. This allowed the reversal of the judgment against Steward to stand and enabled further proceedings against the insurance company, not Steward personally, due to her bankruptcy discharge. The case underscores the bankruptcy court's power to retroactively annul the automatic stay for equitable reasons, especially when doing so does not prejudice the debtor or the estate and serves the interests of justice.

AVOIDANCE ACTIONS

Sovereign Immunity

United States v. Miller, 145 S.Ct. 839 (2025).

The one where the Supreme Court refused to allow the chapter 7 trustee to avoid a transfer under section 544(b) because sovereign immunity precluded the triggering creditor from avoiding the transfer under applicable state law.

In an 8 to 1 decision the Supreme Court held that Congress did not waive sovereign immunity under section 106(a) for suits brought by a trustee relying on state law and standing in the shoes of an actual creditor under section 544(b)(1). The facts are not unfamiliar. A corporation paid $145,000 in federal taxes owed by an insider of the company. The corporation filed bankruptcy three years after the transfer. The chapter 7 trustee sought to avoid the transfer as fraudulent. However, because the transfer did not occur within two years of the petition date, the trustee could not rely on section 548(a)(1)(B). Instead, the trustee invoked section 544(b)(1) and sued the IRS to recover a fraudulent transfer under Utah law. The section provides for the avoidance of a transfer "that is voidable under applicable law by a creditor holding an unsecured claim". The IRS did not refute that there was an actual creditor into whose shoes the trustee could stand to bring the action. The IRS also admitted that the transfer was constructively fraudulent under Utah law.

The IRS contended that sovereign immunity would preclude the actual creditor from suing the IRS outside of bankruptcy. Therefore, the IRS maintained that the trustee, standing in the shoes of the actual creditor, is likewise precluded by sovereign immunity from pursuing the recovery.

Naturally, the trustee countered and argued that the waiver of sovereign immunity as to section 544 expressly reflected in section 106(a) allowed the trustee to recover on his state-law claim. Section 106(a) provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in" 59 sections of the Bankruptcy Code, including section 544. The Bankruptcy Court agreed with the trustee and entered summary judgement for $145,000 in favor of the trustee. On appeal the Tenth Circuit affirmed. *U.S. v. Miller,* 71 F.4th 1247 (10th Cir. 2023).

With its decision, the Tenth Circuit followed the Ninth and Fourth Circuits which had already held that the waiver of immunity in Section 106(a) allowed trustees to recover claims against governmental units under state fraudulent transfer statutes. *See In re DBSI, Inc.,* 869 F.3d 1004 (9th Cir. 2017); and *Cook v. U.S.,* 27 F.4th 960 (4th Cir. 2022). The Tenth Circuit rejected the contrary holding by the Seventh Circuit in *In re*

Equip. Acquisition Res. Inc., 742 F.3d 743 (7th Cir. 2014). To resolve the circuit split, the Supreme Court granted the IRS's petition for *certiorari.*

In reversing the Tenth Circuit, the majority opinion focused on the fact that under section 544(b), unlike 544(a), a chapter 7 trustee is powerless to pursue a claim under applicable law in the absence of an "actual creditor" who could have sued. The Court acknowledged that section 106(a) "waives the Government's sovereign immunity with respect to the federal cause of action created by [section] 544(b)." However, the waiver is jurisdictional and does not serve to "create any new substantive rights against the Government." Recognizing that the waiver of sovereign immunity contained in section 106 does not create substantive rights, the Court, reviewing the text and structure of section 106 and 544, found the waiver of sovereign immunity in section 106(a) "does not operate to modify section 544(b)'s substantive requirements." The Court noted that the actual creditor requirement in section 544(b) is "unique" and "reflects a deliberate congressional choice to tie the trustee's rights under subsection (b) to the rights of an actual creditor under 'applicable law.'" It "would be so anomalous to treat section 106(a) as expanding the trustee's rights beyond those of an actual creditor."

IRS v. Lowe, 2025 WL 887525 (W.D. Tex. Mar. 18, 2025)
The One Where Tax Credits Counted as Value

The court reviewed a bankruptcy court's decision regarding $21,888 in estimated tax payments made by debtors Michael and Etta Dawn Rouquette before filing for Chapter 7 bankruptcy. The bankruptcy court had ruled that these prepetition estimated tax payments were constructively fraudulent transfers under 11 U.S.C. § 548(a), reasoning that the debtors did not receive "reasonably equivalent value" for the payments because their 2021 tax liability had not yet been assessed at the time of the bankruptcy filing. The court ordered the IRS to return the payments to the bankruptcy estate for the benefit of unsecured creditors.

On appeal, the district court focused on whether the debtors received reasonably equivalent value for their estimated tax payments. The court clarified that "value" under § 548(d)(2) includes both property and the satisfaction or securing of a present or antecedent debt. The court found that estimated tax payments, even if made before the tax liability is finally determined, provide a dollar-for-dollar credit against future tax liability and thus constitute property of equivalent value. The court rejected the bankruptcy court's reliance on the debtors' failure to make a "short year election" under 26 U.S.C. § 1398, emphasizing that the value to the debtor at the time of transfer—not the eventual value to the bankruptcy estate—was the relevant consideration.

The district court reversed the bankruptcy court's judgment, holding that the debtors' estimated tax payments were not constructively fraudulent because they received reasonably equivalent value in the form of tax credits. The court noted that treating such payments as fraudulent transfers would create an impermissible windfall for creditors and undermine the Bankruptcy Code's purpose of providing a fresh start to honest debtors. The case was remanded with instructions to enter judgment in favor of the IRS, reinforcing that prepetition estimated tax payments made in good faith are not subject to clawback as fraudulent transfers.

O'Toole v. Heinemann (In re Fun Bowl Vacations, Inc.), 666 B.R. 867 (Bankr. S.D.N.Y. 2025)

The One Where the Bowling Biz Went Bust and the Trustee Wanted the Money Back

Debtor's business was arranging and booking travel/hotel for bowling leagues. The COVID-19 pandemic ended Debtor's business, and the Office of the Attorney General of the State of New York ordered Debtor to return money paid by the leagues. The Chapter 7 trustee moved for summary judgment to avoid certain pre-petition transfers to the Defendants as constructive fraudulent transfers or preferences. The Trustee argued the transfers were made without reasonably equivalent value at a time when Debtor was insolvent, and that some were made within one year of the petition date.

The court found that the 2021 Transfers ($45,000) and one-half of the 2020 Transfers ($22,500) were avoidable as constructive fraudulent transfers under 11 U.S.C. § 548(a)(1)(B) and N.Y. Debt. & Cred. Law § 274(a), because the Debtor did not receive reasonably equivalent value and was insolvent at the time. The remaining half of the 2020 Transfers ($22,500) were not avoided on summary judgment due to a factual dispute over whether they were salary payments for services rendered, which could constitute reasonably equivalent value.

The court rejected the Defendants' argument that the transfers were deferred compensation, finding no evidence of a deferred compensation plan or trust. The Debtor's 2020 tax return supported the Trustee's position that only half of the 2020 Transfers were salary. The Trustee's request for joint and several liability was denied, as the Defendants were not acting as directors authorizing dividends, and each transfer was recoverable only from the specific transferee. The Trustee's alternative preference claim was denied as moot.

In re Applied Machinery Rentals, LLC, 670 B.R. 452 (Bankr. W.D.N.C. 2025)

The One Where the Manager's Tax Payment Got Called a Fraudulent Transfer

The court addressed whether a tax payment made by the debtor's agent from loan proceeds constituted an avoidable fraudulent transfer. The debtor, Applied Machinery Rentals, LLC, through its sole manager and agent, Garth Errol McGillewie Jr., obtained a $1.5 million business loan. The loan proceeds were deposited directly into McGillewie's personal bank account. The following day, McGillewie used over $1 million from that account to pay his and his wife's personal federal tax liability to the IRS. At the time of this transaction, the debtor was insolvent.

The court analyzed whether the payment to the IRS was a transfer of an interest of the debtor in property under 11 U.S.C. § 548, which would make it avoidable as a fraudulent transfer. Applying South Carolina law, the court found that McGillewie, as the debtor's manager and agent, held the loan proceeds in trust for the debtor, meaning the debtor retained an equitable interest in those funds even after they were deposited into McGillewie's personal account. The court determined that the payment of McGillewie's personal tax liability with these funds was both an actual and constructive fraudulent transfer: it was made with intent to defraud creditors and for less than reasonably equivalent value while the debtor was insolvent.

The court granted summary judgment in favor of the Chapter 7 Trustee, holding that the IRS, having received the funds directly from the agent's account, was the initial transferee under 11 U.S.C. § 550(a)(1). As a result, the trustee could recover the payment from the IRS. The decision underscores that a debtor's property interest can persist in funds held by an agent or principal, and that transfers made to pay personal obligations of principals or managers with company funds are subject to avoidance and recovery in bankruptcy, even when the recipient is the IRS.

In re Namo, Nos. 23-41956, 24-04163, 2025 Bankr. LEXIS 57 (Bankr. E.D. Mich. Jan. 13, 2025)

The One About Constructive Fraud and Reasonably Equivalent Value in the Family Condo Dispute

Two siblings purchased a condo for their aging parents: one paying the down payment and carrying cost (Nagara), and the other obtaining financing (Namo). Nagara paid the mortgage payments and condo-related expenses for 17 years, and when the condo sold for less than the purchase price, Namo only transferred a fraction back to her. Namo filed Chapter 7 bankruptcy and the UST sought to avoid the transfer to Nagara as a constructively fraudulent transfer.

Looking at 11 U.S.C. § 548(a), the Court determined the issue was whether Namo received reasonably equivalent value in exchange for the transfer. "Value" is defined as "property, or satisfaction or securing of a present or antecedent debt of the debtor but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor[.]" 11 U.S.C. § 548(d)(2)(A). In determining reasonably equivalent value, the determination should be “based on all of the facts and circumstances of the case. The Court should 'compare what was given with what was received.' And, in making this determination, both direct and indirect benefits should be considered. It is not necessary that there be an exact exchange in order to establish reasonably equivalent value[.]" *Tomsic v. Pitocchelli (In re Tri-Star Technologies Co., Inc.)*, 260 B.R. 319, 325-26 (Bankr. D. Mass. 2001).

Because the transferred proceeds were derived from Nagara’s down payment and mortgage payments, the sale of the condo would have yielded nothing for unsecured creditors and thus no change on Namo’s estate. The Court determined that the reasonably equivalent value inquiry was a question of fact and denied UST’s motion for summary judgment.

Magaliff v. 430 Central Drive LLC (In re Christenson), 667 B.R. 770 (Bankr. S.D.N.Y. 2025)

The One Where the Divorce Decree Established Reasonable Equivalent Value

Debtor commenced a divorce proceeding against her husband, Stephen Jones. After the Debtor filed her Chapter 7 petition, the Trustee commenced an adversary proceeding to unwind the transfer of three properties-430 Central Drive, Briarcliff Manor, NY; 40 Lower County Road, Dennis Port, MA; and 94 South Highland Avenue, Ossining, NY (collectively, the "Properties")-transferred pursuant to the Amended Divorce Judgment. Initially, the Settlement Stipulations provided Debtor would transfer her ownership interest in the Properties in exchange for $250,000 from Jones's parents, but this consideration changed to alternative forms in the Amended Divorce Judgment due to the parents' inability to obtain financing.

The Trustee alleged Debtor did not receive fair consideration in exchange for the transfer of her interest in the Properties alleging constructive and intentional fraud. The Court clarified that “Under section 544(b) of the Bankruptcy Code, the Trustee may assert a claim under state fraudulent transfer law if there is an unsecured creditor who could pursue the action. In Counts II, V, and VIII, the Trustee relies on the prior iteration of New York's constructive fraudulent conveyance statute, which provides for the avoidance of conveyances made without "fair consideration." *See* N.Y. DCL § 273. "Every conveyance made . . . by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made . . . without fair consideration.") (repealed 2019). "Courts use the

term 'fair consideration' interchangeably with 'reasonably equivalent value,' relevant in Bankruptcy Code section 548 fraudulent transfer claims, when examining constructive fraud claims." *Off.*

The Court held that because New York has an interest in the finality of divorce judgments, it would follow the Fifth and Ninth Circuits in holding that a valid divorce judgment or decree conclusively established reasonably equivalent value within the meaning of 11 U.S.C. § 548(a)(1)(B). The Court found that Husband provided multiple forms of valuable consideration to settle their contentious divorce, including assuming a $50,000 Parent Plus loan, extending maintenance payments totaling $100,080, paying the Debtor's capital gains tax of $75,000, and relieving a $11,000 credit card obligation. Additionally, the Court found the Trustee's argument that Debtor's interest in the Properties would be passed on to her children unavailing, as this is common in divorce proceedings and not indicative of fraud or collusion. The Court found there was no collusion or intent to collude to defraud creditors. The Court also found the Trustee's unjust enrichment claim (Count X) was duplicative of the fraudulent transfer claims.

The Trustee failed to raise a disputed issue of material fact regarding fraud or collusion leading to the entry of the Amended Divorce Judgment which entitled the Defendants to summary judgment on all counts.

Reinbold v. Menard Inc. (In re 180 Equipment LLC), 670 B.R. 102 (Bankr. C.D. Ill. 2025)

The one where savings big money at Menards benefited the debtor in an arm's-length transaction while the goods purchased ultimately benefited non-debtor entities.

The Chapter 7 Debtor paid for goods at Menards, a home improvement store, for the benefit of non-debtor entities. In each transaction, an agent of the non-debtor entity would pick out goods, take it to the cash register, use the Debtor's credit card (which he was authorized to use), and then take the goods out of the store for use by the non-debtor entity. The Trustee alleged both actual and constructive fraud and sought to recover from Menard, Inc., all payments the Debtor made. Menard moved for summary judgment, asserting the affirmative defense that it was a good-faith transferee who took for value under 11 U.S.C. §548(c), which the court granted.

Erick Jones defrauded First Midwest Bank by millions of dollars and subsequently his company I80 (the Debtor). However, no one at Menards had any reason to believe there was a fraudulent scheme or that the transactions were for the benefit of third parties, thus Menard acted in good faith.

The Trustee argued that Menard did not give value to the Debtor, I80, when the Jones entities took the goods, focusing on the literal language of §548(c) in a three-party transaction. The Court held that Menard was entitled to judgment in its favor, emphasizing that fraudulent conveyance law looks to substance, not form. The court provided two alternative rationales for its decision: (1) viewing each transaction as a transfer from Menard to I80's designee (a Jones entity), Menard gave value to the debtor for purposes of §548(c); or (2) recharacterizing each transaction as two separate transfers-from Menard to I80, and then from I80 to a Jones entity-Menard would be protected as giving value to the debtor in the first transfer. The court also noted that third parties operating at arm's length, like Menard, need not scrutinize a debtor's financial condition to have confidence in their transactions for value and in good faith. *Boyer*, 587 F.3d at 793.

Westenhoefer v. First Nat'l Bank (In re Kel), Nos. 24-30185, 24-3005, 2025 LX 280646 (Bankr. E.D. Ky. Feb. 4, 2025) (aka In re Dean, No. 24-30185, 2025 WL 392958 (Bankr. E.D. Ky. Feb. 4, 2025))

The one where the Chapter 7 Trustee's strong-arm powers win again when the vehicle lienholder fails to comply with state perfection statutes.

The court addressed whether a bank's lien on a vehicle was properly perfected under Kentucky law. The Debtors owned property that straddled both Carroll and Trimble Counties. While the deed and mortgages for their property were recorded in Carroll County, Mr. Dean applied for a vehicle title, and the bank filed its lien in Trimble County, based on information provided by Mr. Dean. The Chapter 7 Trustee sought to avoid the bank's lien, arguing it was unperfected because it was filed in the wrong county.

The court examined Kentucky Revised Statute § 186A.190, which requires that liens on titled vehicles be filed in the county where the debtor resides. The court determined that, for purposes of lien perfection, "residence" is established by where the deed and mortgages are recorded and where the property is taxed—in this case, Carroll County. The court rejected the bank's argument that Mr. Dean's intent or his representations (such as his driver's license and voting records in Trimble County) should control. The court emphasized Kentucky's policy of certainty in recording, holding that the place of recordation for personal property liens should align with the county of record for real property.

The bank also argued that it was protected by a statutory "safe harbor" because it relied on Mr. Dean's designation of county on a notarized application. However, the court found that the safe harbor only applies if the debtor's designation is made in a sworn statement, which was not the case here. As a result, the court held that the bank's lien was unperfected and avoidable by the Trustee under 11 U.S.C.

§ 544(a)(1). The Trustee's motion for summary judgment was granted, and the bank's lien on the vehicle was avoided for the benefit of the bankruptcy estate.

Paloian v. Byline Bank (In re Kowalski), 2025 WL 1392201 (Bankr. N.D. Ill. May 13, 2025)

The One With the Conversion Claim: Bankruptcy Trustee v. Bank Over Post-Petition Cashier's Checks

The court addressed disputes arising from the handling of 36 cashier's checks totaling $352,166.35. These checks were purchased by Debtor Robert M. Kowalski from Byline Bank before he filed for bankruptcy, with most made payable to himself. After the bankruptcy filing, the Chapter 7 trustee notified Byline Bank of the bankruptcy, but the checks remained outstanding. Subsequently, Kowalski's wife deposited the checks into her attorney trust account at Bank of America, which then presented them to Byline Bank for payment. Byline paid the checks without manual review, relying on its automated fraud detection system.

The trustee brought claims against Byline Bank for violation of the automatic stay, conversion under Illinois law, and turnover of estate property. The court found that Byline did not violate the automatic stay when it paid the checks post-petition, as 11 U.S.C. § 362(b)(11) provides an exception for the presentment and payment of negotiable instruments. However, the court determined that Byline was liable for conversion because it paid the checks to an entity (Bank of America for deposit into an account not belonging to the payee) without proper authorization, thereby depriving the bankruptcy estate of its property. The court also held that while the trustee could avoid the post-petition transfer under 11 U.S.C. § 549, recovery of the transferred funds from Byline as a transferor was not permitted under 11 U.S.C. § 550, which limits recovery to transferees.

The court entered judgment in favor of the trustee on the conversion claim, awarding damages equal to the value of the checks. Byline Bank prevailed on the claims for violation of the automatic stay and turnover of property, as its actions fell within statutory exceptions and it did not have the funds after the transfer. This case clarifies the interplay between the automatic stay, negotiable instrument exceptions, and the remedies available to bankruptcy trustees, emphasizing that while certain post-petition payments may not violate the stay, banks can still face liability for conversion if they improperly pay negotiable instruments belonging to the bankruptcy estate.

O'Toole v. Radium2 Capital LLC (In re J.P.R. Mechanical Inc.), 2025 WL 1550541 (Bankr. S.D.N.Y. May 30, 2025)

The One Where Merchant Cash Advances Aren't What They Seem

The court addressed whether certain "merchant cash advance" agreements between the debtor, J.P.R. Mechanical Inc., and Radium2 Capital, LLC were true sales of future receivables or disguised loans. The agreements were styled as purchases of a percentage of future receipts, but the court examined their substance, not just their form, to determine their true nature. The debtor filed for Chapter 7 bankruptcy, and the Chapter 7 Trustee sought to avoid three prepetition transfers made to Radium2 as preferential payments under 11 U.S.C. § 547(b).

The court found that the agreements functioned as loans rather than true asset sales. This conclusion was based on several factors: the lack of a genuine reconciliation provision, the existence of de facto fixed terms, and the presence of recourse against the debtor and its guarantor in the event of default or bankruptcy. The court also noted that Radium2 had filed proofs of claim in the bankruptcy case, identifying itself as a creditor, which further supported the loan characterization. As a result, the court held that the transfers made under these agreements were avoidable preferences because they were made to a creditor, on account of antecedent debt, while the debtor was insolvent, and within 90 days of the bankruptcy filing.

Radium2 Capital failed to establish any valid defenses, including the "ordinary course of business" defense under § 547(c)(2), as the transfers were not made in the ordinary course of business or according to ordinary business terms. The court granted summary judgment in favor of the Trustee, allowing the avoidance and recovery of the transfers and disallowing Radium2's claims against the bankruptcy estate. This decision underscores that courts will look beyond the labels in merchant cash advance agreements to their economic reality, especially in bankruptcy, and that such arrangements may be recharacterized as loans with significant consequences for both funders and debtors.

EXHAUSTING ADMINISTRATIVE REMEDIES

In re Ray, No. 21-30431, 2025 Bankr. LEXIS 65 (Bankr. W.D.N.C. Jan. 15, 2025)

The One Where the IRS Refund Sparked a Turnover Tug-of-War

Debtor filed a voluntary Chapter 13 petition, and subsequently, the IRS filed a proof of claim for three years that are owed. After Debtor filed a Claim Objection that was overruled, the Court entered an Order overruling the objection. Debtor filed a motion to sell her residence and requested that she pay the

IRS at closing. Eventually, Debtor defaulted under the Chapter 13 plan and the case was converted to a Chapter 7 case, and the Court granted Debtor a discharge under § 727. Five months after the discharge was granted, the Debtor received a notice indicating that she was entitled to a tax refund of that would be applied "to an amount owed for 2018" however, that amount had been paid in the Chapter 13 case. After the IRS refused to discuss the matter, Debtor motioned to reopen the bankruptcy case and requested turnover of property, assessment of damages upon the IRS, and injunctive relief against the IRS with her Motion for Turnover for Sanctions and to Enforce Discharge Injunction.

11 U.S.C. § 542. Federal Rule of Bankruptcy Procedure 7001 mandates that actions brought under section 542, including "a proceeding to recover money or property," must be brought as an adversary proceeding. See Fed. R. Bankr. P. 7001(a). This includes any proceeding to obtain a tax refund. See Collier on Bankruptcy ¶ 7001.02 (16th ed. 2024) (citing In re Dunmore, 262 B.R. 85, 86 (Bankr. N.D. Cal. 2001)). Thus, Debtor should have initiated an adversary proceeding under 7001.

As far as damages, the Court found IRS' conduct willful under § 524; however, Debtor did not exhaust the administrative remedies available to her before seeking relief in Court namely the relevant statutes and regulations the IRS provided. Because the Debtor had not exhausted the relevant administrative remedies, the Court could not employ its equitable authority under § 105 and 26 U.S.C. § 7433(e)(2)(A) for the IRS' willful violations. The injunctive relief was denied.

In re Galarza, 2024 WL 4712992 (Bankr. D.P.R. Nov. 7, 2024)
The one where a debtor failed to exhaust his administrative remedies before suing the IRS for recovery of funds levied against debtor's bank account.

Debtor's Schedule E/F included the Internal Revenue Service for prepetition taxes owed. The IRS did not file a proof of claim because there was no deadline to do so in the debtor's no-asset case.

Four years after the debtor received a discharge, the IRS levied on bank accounts. The debtor e-mailed an IRS agent, declaring that levying violated the discharge injunction and demanding return of the levied funds plus cessation of any future levy. The IRS continued to levy.

The debtor moved to reopen the bankruptcy case and then sued the IRS for allegedly violating the discharge injunction. The IRS moved to dismiss for lack of jurisdiction because the debtor had not exhausted all administrative remedies as required by 26 U.S.C. § 7433(d)(1).

That section states that claims may only be brought against the IRS after exhausting all administrative remedies with the agency. Federal regulation defines the available administrative remedy as:

1) writing to the Chief, Local Insolvency Unit, for the judicial district where the taxpayer filed the bankruptcy case and describing
2) in reasonable detail, the violation, including copies of documents and correspondence,
3) the taxpayer's injury incurred by filing a claim with the IRS, and
4) the dollar amount of the claim, including reasonably foreseeable future damages.

26 C.F.R. § 301.7433-2(e)(2) (2024).

The debtor merely e-mailed an IRS agent demanding repayment and cessation of levying. No attempt was made at an administrative remedy. So, the bankruptcy court found that it lacked jurisdiction and dismissed the complaint.

CONTEMPT

McGann v. Jagow (In re McGann), 2025 WL 249990 (BAP 10th Cir. Jan. 21, 2025)

The One Where Contempt Proceedings Could Compel Attorney's Fees.

A Chapter 7 Debtor's primary tangible asset was real property and would not allow the UST to value it. The UST filed a motion for turnover which was granted, but Debtor never supplied a key. After a second motion for turnover and a contempt motion, Debtor mailed a key after 11 weeks. The Court found debtor in contempt and ordered attorney's fees as a sanction.

The bankruptcy court has authority under 11 U.S.C. § 105 to enforce its orders through civil contempt and to award compensatory sanctions, including attorney's fees. To find civil contempt, the court must find a clear and specific order was violated, the party had notice, and the violation is proven by clear and convincing evidence. The appellate panel reviewed for abuse of discretion and found none. The record showed Debtor had notice of the order, the order's terms were clear, and she failed to comply by the deadline. Mailing the key late and to the wrong party did not constitute compliance.

The UST incurred attorney's fees as a direct result of Debtor's noncompliance, justifying the compensatory sanction. The panel rejected Debtor's arguments regarding lack of damages, unclean hands, and her personal stress, finding no evidence of improper conduct by the trustee and noting that her stress argument was not properly preserved for appeal.

DEBTOR REPRESENTATION

In re Chapter 7 Fees and Practices of My Arizona Lawyers PLLC and Related Financing Agreements with EZLegalFees LLC, 668 B.R. 267 (Bankr. D. Ariz. 2025***)***

The One Where the Attorney Had to Disclose the Fees

My Arizona Lawyers, LLC which was a firm owned and operated by Ms. Kallen had third-party financing from EZLegalFees; however, the agreement was never in writing. The Court issued an Order to Show Cause as to why the Court should not "(1) void all post-petition retention agreements between My Arizona Lawyers and Chapter 7 debtors on the basis that they violate the Bankruptcy Code and Local Rules for the United States Bankruptcy Court for the District of Arizona (the "Local Rules"); (2) order the disgorgement of all fees paid pursuant to or otherwise attributable to such post-petition retention agreements; and/or (3) bar Ms. Kallen from practicing before this Court given the structure and conflicts of interest inherent in her Firm's financing arrangement with EZ Legal. EZ Legal was ordered to show cause as to why this Court should not void all financing agreements signed by Chapter 7 debtors represented by My Arizona Lawyers and/or impose sanctions, as may be deemed appropriate."

The Court ordered the parties to file lists of all cases the Firm filed that involved EZ Legal financing. The Court ordered them to address the inconsistencies in their financing, file disclosures, issues sanctions, and restricted their ability to file new cases among other things. After violating the Court's order and failing to file the items requested, the UST filed a Motion to Examine Fees Paid, Disgorge Fees, and Impose Sanctions Against Candace Kallen and My Arizona Lawyers, PLLC. While Ms. Kallen and her Firm argued that the fees were reasonable and the inadequate disclosures were inadvertent, EZ Legal argued that it did not engage in bad faith and that the Court lacked jurisdiction to void the financing agreement. The Court used a vast amount of legal authority to issue its ruling in finding the arrangement void:

> Pursuant to 11 U.S.C. § 329:
>
> (a) Any attorney representing a debtor in a case under [the Bankruptcy Code], or in connection with such a case . . . shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
>
> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, [*283] or order the return of any such payment, to the extent excessive . . . .
>
> Federal Bankruptcy Rule 2016(b) requires that an attorney's § 329 disclosure include "whether the attorney has shared or agreed to share the compensation with any other entity" and "the particulars of any sharing or agreement to share" by the attorney.
>
> "Once the bankruptcy court determines that an attorney has violated § 329 and Rule 2016, the bankruptcy court has the authority to order the attorney to disgorge all of his [or her] fees." *In re Basham*, 208 B.R. 926, 931 (9th Cir. BAP 1997), *aff'd sub nom. In re Byrne*, 152 F.3d 924 (9th Cir. 1998). "Even a negligent or inadvertent failure to disclose fully relevant information may result in a denial of all requested fees." *In re Park-Helena Corp.*, 63 F.3d 877, 882 (9th Cir. 1995).
>
> Section 528(a)(1)(B) requires debt relief agencies**33** to execute written contracts "that explain[] clearly and conspicuously the fees or charges [the agency will charge for]

> services, and the terms of payment[.]" Pursuant to § 526(c)(1), "[a]ny contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of . . . section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person."
>
> Section 526(a)(2) prohibits debt relief agencies from "mak[ing] any statement . . . that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue [**31] or misleading[.]"
>
> Pursuant to § 526(c)(2):
>
> Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received . . . if such agency is found, after notice and a hearing, to have -
>
> (A) intentionally or negligently failed to comply with any provision of [§ 526] . . . or section 528 with respect to a case or proceeding under [the Bankruptcy Code] for such assisted person;
>
> (B) . . . ; or
>
> (C) intentionally or negligently disregarded the material requirements of the [Bankruptcy Code] or the Federal Rules of Bankruptcy Procedure applicable to such agency.
>
> Pursuant to § 526(c)(5), "[n]otwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee . . . , finds that a person intentionally violated [§ 526], or engaged in a clear and consistent pattern or practice of violating [such] section, the court may (A) enjoin the violation . . .; or (B) impose an appropriate civil penalty against such person."
>
> Section 105(a) authorizes the Court to "issue any order, process, or judgment that is [**32] necessary or appropriate to carry out the provisions of [the Code,]" and "take[] any action or make[] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." Further, the Court has broad inherent authority to sanction bad faith conduct and discipline attorneys who appear before it. *In re Deville*, 280 B.R. 483, 494-95 (9th Cir. BAP 2022), *aff'd sub nom. In re Deville*, 361 F.3d 539 (9th Cir. 2004); *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996); *In re Brooks-Hamilton*, 400 B.R. 238, 246 (9th Cir. BAP 2009); *In re Cuomo*, NV-13-1294-PaJuHl, 2014 Bankr. LEXIS 4523, 2014 WL 5358180, at *9 (9th Cir. BAP Oct. 21, 2014).

The Court also cited the Arizona Rules of Professional Conduct. Because Ms. Kallen did not disclose fee sharing or the true source of compensation paid, the Firm's Retention Agreement did not accurately or clearly explain the fees and charges for the services and contain material misrepresentations, the agreement contain numerous improper conflict of interest waivers, the Court found the agreements void and that Ms. Kallen and the Firm were liable for all fees and charges paid by debtors. Additionally, EZ Legal retained no right to collect the funds from debtors either.

Sweet v. Majors Law PLLC (In re Shastal), Nos. 20-31468-jda, 24-3033, 2025 Bankr. LEXIS 240 (Bankr. E.D. Mich. Feb. 7, 2025)

The One Where Legal Malpractice Costs a House

Recovery Law Group (RLG) hired Sheena Majors as a non-equity partner, and together they filed the Debtors' Chapter 7 bankruptcy petition. The Debtors, John Frederick Shastal, Jr. and Kimberly Ann Shastal, owned a home resided in by their son and granddaughter, and they sought assistance with collection efforts. The Statement of Attorneys for Debtor(s) Pursuant to Fed. R. Bankr. P 2016(b) did not include RLG. Their Retainer Agreement included a nonrefundable flat fee, a filing fee, and additional charges for reaffirmation agreements. Majors and RLG committed numerous errors and omissions, including failing to include all required documents and schedules for their petition, leading to the denial of their motion to extend the deadline for filing schedules after failing to file a Certificate of Non-Response. They never amended the Debtors' residence's value after learning of significant equity, nor filed a new Means Test Calculation Form, nor gave Debtors the documents to review before filing. The lawyers advised conversion to Chapter 13 but failed to appear at the conversion hearing or renew the motion. Next, they failed to file the Financial Management Course Certificate for 14 months, delaying the Debtors' discharge. Additionally, despite the UST negotiating a payment plan, Majors failed to appear, resulting in the UST's Motion to Sell Property Free and Clear of Liens under Section 363(f) being granted, leading to the loss of the Debtors' home. The UST then filed a Disbursement Motion that excluded the Debtors' homestead exemption, and their lawyers failed to object to preserve their exemption, leading to a substantial loss of equity. After the Court issued an Order to Show Cause between Majors and RLG, RLG did not initially appear. The Court adjourned, and Majors did not appear, but RLG did. Eventually, the United States Trustee filed a Motion to Review the Conduct of Sheena Majors and Recovery Law Group, to Cancel the Retention Agreement, to Disallow and Return Funds Paid, and for Other Relief, which was met with failures to appear and untimely responses. Subsequently, the Trustee and Debtors filed a malpractice action and violations of 11 U.S.C. § 526, incurring additional costs for new counsel. A default judgment was issued against Majors.

Plaintiff filed a motion for partial summary judgment against Recovery Law Group for legal malpractice. Under Michigan Law, "a plaintiff in a legal malpractice case must prove four elements: (1) existence of an attorney-client relationship; (2) negligence in the representation; (3) that such negligence was a proximate cause of an injury; and (4) the fact and extent of the injury." Simko v. Blake, 448 Mich. 648, 532 N.W. 2d. 842, 846 (Mich. 1995).

All four elements of legal malpractice were met, and RLG was found vicariously liable for the actions of Majors under respondeat superior. Thus, the motion for partial summary judgment was granted

for Plaintiffs' legal malpractice claim as to liability only, with damages to be determined in further proceedings.

DISCHARGE OF DEBTS

United States Tr. v. Fhuere (In re Fhuere), 667 B.R. 904 (Bankr. D. Utah 2025)

The One Where the Missing Records Cost the Discharge

Debtor operated a business that restored/customized collectible automobiles for 35 years. However, Debtor failed to keep and preserve business records, and these bank statements were legally insufficient for the parties to understand and trace the flow of funds for Debtor's business. Debtor had two prior Chapter 13 bankruptcy cases, but this case was proceeding as a Chapter 7 case. Debtor failed to notify many of his creditors to the filing, did not file tax returns for 2022-2023, failed to list many accounts on his Schedule, and failed to know the extent and amount of his short-term loans from six Short-Term Lenders.

The UST sought a denial of Debtor's discharge under § 727(a)(3) which operates as a burden-shifting. "The court shall grant the debtor a discharge, unless . . . (3) the debtor has . . . failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case . …" As used in § 727(a)(3), the terms "keep" and "preserve" impose different duties on a Chapter 7 debtor. To "keep" a record means that the debtor is recording business information in a generally contemporaneous, comprehensible, and reasonable manner to facilitate a determination of the business's financial status and the preparation of required reports and tax returns. In other words, the debtor has an affirmative duty to "to create books and records accurately documenting his business affairs." To "preserve" means the debtor permanently recorded and stored business records in a manner that makes them reasonably recoverable and understandable by a trustee or other party in interest such that they can ascertain the debtor's present financial condition along with its financial history and transactions going back a reasonable amount of time." Courts place a higher burden of recordkeeping on debtors who operate businesses. The Debtor failed to maintain and preserve records which switches the burden to the Debtor to justify their failure – intent is irrelevant under § 727.

Here because Debtor had 35 years as a business owner, and his practice of transferring large sums of money to different bank accounts made it impossible to understand and track the income, expenses, and transactions of his business. Under a matter of law, Debtor's records were insufficient, there were no tax returns for multiple years, and that for purposes of § 727(a)(3) it is impossible to ascertain Debtor's true

financial condition, and Debtor's failure was not justified. The Court provided three fact scenarios were debtor's failure to maintain records would be justified "(1) the debtor's car collection was a hobby and not a for-profit business; (2) the debtor reasonably relied on her spouse to keep and maintain records; and (3) the debtor was the victim of domestic abuse that caused 'her to lose control over her financial circumstances, including her ability to retain financial records.'" Thus because of Debtor's lack of an accountant, his preference to use cash, and his maintenance of separate client folders using pencil and paper—which he did not produce—did not justify his failure to keep and preserve adequate business records under § 727(a)(3).

Debtor's discharge in his Chapter 7 case was denied, and Plaintiffs summary judgment motion was granted.

Mikhail v. Hawasli (In re Hawasli), 2025 WL 1932074 (E.D. Mich. July 14, 2025)

The One Where the Doctor's Pre-Petition Transfers to His Kids was NOT Fraudulent

Abdelkader Al Hawasli, a medical doctor, filed for Chapter 7 bankruptcy after a $3.5 million medical malpractice judgment was entered against him in favor of Saja Mikhail. Mikhail objected to Hawasli's discharge, alleging that he made fraudulent transfers to hinder creditors and knowingly made false statements or omissions on his bankruptcy schedules and Statement of Financial Affairs (SOFA) with fraudulent intent. The court held a trial to determine whether Hawasli's actions warranted denial of discharge under 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(4)(A).

The court closely examined Hawasli's financial transactions, particularly substantial transfers to his children and their businesses, as well as investments in speculative ventures like Dronline, a company owned by his son. While the timing and amounts of some transfers raised concerns, the court found Hawasli's explanations credible. Evidence showed that his pattern of financial support and investments in his children's businesses predated any knowledge of Mikhail's malpractice claim. Additionally, Hawasli and his legal counsel genuinely believed the malpractice suit lacked merit and would not result in liability. The court also found that Hawasli's bankruptcy disclosures, including supplemental spreadsheets provided to the Chapter 7 Trustee, were sufficiently transparent and truthful.

Ultimately, the court concluded that Mikhail failed to prove Hawasli acted with the intent to hinder, delay, or defraud creditors, or that he knowingly made false statements with fraudulent intent. The court emphasized that exceptions to discharge must be strictly construed against the creditor and that the debtor's credibility was key. Because Hawasli's conduct did not meet the standard for denial of discharge under the

relevant Bankruptcy Code provisions, the court overruled Mikhail's objections and granted Hawasli a discharge

Rogne v. Digit. Forensics Corp., No. 24-cv-2612 (KMM/TNL), 2025 U.S. Dist. LEXIS 5865 (D. Minn. Jan. 13, 2025)

The one where an arbitration clause in a discharged chapter 7 debt is unenforceable.

Debtor incurred a debt with Defendant for digital data recovery services which included two agreements. In the first agreement, Debtor agreed to communicate any issue with customer service, if necessary, participate in mediation, and if all else failed, then submit to binding arbitration. Additionally, the agreement included an Ohio forum selection clause and choice of law provision. Debtor eventually filed a Chapter 7 petition, but after the Defendant received notice of the bankruptcy discharge, they continued collection efforts and sent notices. The Court determined these actions violated 11 U.S.C. § 524; however, the Defendant pushed the Court to compel arbitration.

Several courts have held that, absent a reaffirmation agreement between the debtor and the creditor, an arbitration agreement embedded in a contract terminated by a bankruptcy discharge is unenforceable. *Jernstad*, 2012 U.S. Dist. LEXIS 108988, 2012 WL 8169889, at 2; *see also In re Harrier*, 903 F. Supp. 2d 1281, 1284 (M.D. Fla. 2012); *In re Jorge*, 568 B.R. 25, 30-31 (N.D. Ohio 2017); *Green Tree Servicing, LLC v. Fisher*, 2007 OK CIV APP 50, 162 P.3d 944, 947-48 (Okla. Ct. App. 2007). The Court found that Debtor's bankruptcy discharge renders the arbitration agreement unenforceable and that the Defendant's motion to compel arbitration was denied because there was no reaffirmation agreement.

DISCHARGEABLITY OF DEBTS

The Discharge Injunction-§523(a)

Christenson v. Breitenfeldt (In re Christenson), 666 B.R. 794 (Bankr. Minn. 2025).

The one where the creditor failed to obtain bankruptcy court approval of a stipulation that a debt is nondischargeable.

Debtor filed an individual chapter 7 in 2010 and listed creditor as the holder of an unsecured, non-priority claim for $310,000. Creditor timely initiated an adversary proceeding against debtor seeking a determination that the debt was nondischargeable under sections 523(a)(2), (4), and (6). Prior to trial the creditor, represented by counsel, and the debtor, pro se, completed and signed an extra-judicial settlement agreement which agreed the debt was nondischargeable. The parties notified the court that the adversary

proceeding had been settled and requested that it be dismissed. The bankruptcy court entered an order dismissing the adversary proceeding without prejudice. The court also entered an order discharging debtor's debt, and the case was closed in the normal course on October 25, 2011. The parties never filed the settlement agreement with the court, nor were there any findings made on the record regarding the non-dischargeability of the debtor's debt to the creditor.

Debtor subsequently defaulted under the settlement agreement. In 2013 the creditor obtained a state court judgment against debtor. In 2023, creditor renewed the judgment and in 2024 the creditor conducted an execution sale on the debtor's home.

Debtor reopened his 2010 bankruptcy case and sued the creditor contending that the creditor violated the discharge injunction. Relying on the settlement agreement, the creditor maintained that the debt was excepted from the discharge. Debtor filed a motion for summary judgement contending that, because the court did not formally declare the debt non-dischargeable, it was discharge.

The court agreed with the debtor relying on the plain language of section 523(c) (1) of the bankruptcy code. In relevant part, this section provides that the debtor "shall be discharged from a debt of the kind specified in paragraph (2), (4), or (6)" unless "the court determines such debt to be excepted from discharge". As the creditor failed to file the settlement agreement and otherwise failed to obtain an order or judgment declaring the debt nondischargeable, the debt was subject to the discharge injunction. The clear lesson for creditors' counsel is to always secure a judgment from the court formally declaring debts of the type described in 523(A)(2), (4), or (6) nondischargeable.

Trustee Removal-11 U.S.C. § 523(a)(2) and § 523(a)(7)

United States v. Schoenmann (In re Schoenmann), 2025 Bankr. LEXIS 1603, 2025 WL 1840384 (Bankr. N.D. Ca. July 3, 2025).

The one where 150% of the debt to the SBA was non-dischargeable.

Debtor, a panel trustee (later removed), obtained an EIDL loan from the SBA of more than $900,000. Debtor used much of the money to pay legal fees she had incurred in a pending probate proceeding involving her deceased husband's children (debtor's stepchildren) or placed in a brokerage account. Only $55,000 was properly used as working capital respecting the debtor's chapter 7 trustee business. The SBA filed an adversary proceeding seeking a declaration that the debt was non-dischargeable under section 523(a)(2) because the debtor misused the proceeds and failed to disclose the pending litigation in the probate court. After a trial the bankruptcy court declared the debt non-dischargeable due to the

debtor's intentional failure to disclose the litigation in the loan application and the debtor's fraudulent misuse of the loan proceeds.

Of note, 15 U.S.C. § 636(b) states that "Whoever wrongfully misapplies the proceeds of [an EIDL loan] shall be civilly liable to the [SBA] in an amount equal to one-and-one half times the original principal of the loan." The court held that this civil liability was a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" and, accordingly, was non-dischargeable pursuant to section 523(a)(7). The court awarded the SBA a non-dischargeable judgment in the amount of $2,314,790.11 consisting of the unpaid principal, interest, and the 150% penalty.

Willful and Malicious Injury- § 523(a)(6)

Watson v. Bradsher, (in re Watson), 2025 U.S. App. LEXIS 19554, 2025 WL 2205853 (11th Cir. Oct. 4, 2025).

The one where the county commissioner went to a bar, and no one stole his wallet.

Prior to filing bankruptcy, the debtor, a Dekalb County, Georgia commissioner, became belligerent at a bar and accused two women of stealing his wallet. One of the ladies had previously rejected his request that she join him at his home. The debtor pressured police officers to arrest the ladies, and they were arrested. The next day the debtor discovered that he left his wallet in his car. The ladies obtained a state court judgment for $150,150 for false imprisonment, slander, and battery. The debtor filed a chapter 7 seeking to discharge the debt. The ladies filed a complaint seeking a declaration that the debt was non-dischargeable under § 523(a)(6) as a debtor "for willful and malicious injury". After a trial the bankruptcy court declared the debt nondischargeable. On appeal to the 5th Circuit the debtor contended that, because he "genuinely believed" that the ladies had stolen his wallet, their confinement was neither "willful" nor "malicious". The 5th Circuit rejected the argument and affirmed the bankruptcy court's decision. Because he intended to cause the confinement and because that was the injury, the debtor's conduct was willful. Further, because the debtor's conduct was "excessive" the lower court's finding that the debtor acted maliciously was not clearly erroneous.

Vicarious Liability & Discharge

M.O. v. Del Rosario (In re Del Rosario), 668 B.R. 618 (B.A.P. 9th Cir. 2025).

The one where vicarious liability for torts committed by debtor's child did not render a judgment debt for that tort nondischargeable.

The debtors' child placed a pen on the appellant's chair in such a way that the appellant was injured upon sitting down. A state court action against the debtors and their child for battery and intentional infliction of emotional distress resulted in a default judgment to the tune of $1,045,609.46. How big was the pen?

The debtors filed a chapter 7 petition, and the appellant commenced an adversary proceeding to have the judgment debt declared nondischargeable under 11 U.S.C. § 523(a)(6). An amended complaint in the adversary proceeding asserted that the debtors were liable for the full debt based upon vicarious liability for the willful and malicious conduct of their child.

Neither the bankruptcy court nor the appellate panel bought that argument. Relying heavily on *Bartenwerfer*—and its focus on the use of passive voice in one section but not others to find that fraud committed by a business partner other than the debtor could be a nondischargeable debt under Section 523(a)(2) for the debtor*—the bankruptcy appellate panel stressed that Section 523(a)(6) requires willful and malicious conduct to be carried out "by the debtor."

Accordingly, vicarious liability under non-bankruptcy law does not impute the wrongful conduct and intent of the tortfeasor onto a third-party debtor for determining whether a debt is nondischargeable under 11 U.S.C. § 523(a)(6).

Horton v. O'Keefe (In re O'Keefe), 2025 WL 704081 (Bankr. E.D. Wis. Mar. 4, 2025)

The One Where Self-Defenses Beat Malice

The court addressed whether injuries caused by the debtor, Joshua Patrick O'Keefe, to Timothy Horton during a physical altercation were excepted from discharge under 11 U.S.C. § 523(a)(6), which covers debts for "willful and malicious injury." The incident occurred when Horton confronted O'Keefe at a commercial property, suspecting him of theft. Horton blocked O'Keefe's truck, accused him aggressively, and threatened that others were coming. Feeling threatened, O'Keefe struck Horton three times in the face after Horton appeared to kick at him, resulting in serious injuries.

The court analyzed whether O'Keefe's actions constituted a "willful and malicious injury" under federal bankruptcy law, with reference to Wisconsin's civil law of self-defense. Under Wisconsin law, self-defense is justified if the defendant reasonably believed force was necessary to prevent injury and the amount of force used was reasonable under the circumstances. The court found O'Keefe's belief that he needed to use force was reasonable, given Horton's aggressive conduct, threats, and physical actions. The amount of force used—three punches—was also deemed reasonable from O'Keefe's perspective at the time, even though the injuries were severe.

Ultimately, the court concluded that O'Keefe acted in lawful self-defense and did not violate Horton's legal rights, meaning no "injury" occurred within the meaning of § 523(a)(6). Even if there had been a technical violation, Horton failed to prove that O'Keefe acted with malice, as O'Keefe did not consciously disregard his duties or act without just cause or excuse. As a result, any debt arising from the altercation was dischargeable in bankruptcy, and judgment was entered in favor of O'Keefe.

Karam Family LLC v. Lane (In re Lane), 2025 WL 1232602 (Bankr. S.D. Miss. Apr. 28, 2025)

The One Where Bitcoin Betrayal Led to a Nondischargeable Judgment

The court addressed whether a debt arising from a Florida state court default judgment was dischargeable in bankruptcy. Christopher Ladale Lane, the debtor, had received $270,000 from Karam Family, LLC for the purchase of bitcoin mining machines but failed to deliver the machines or refund the money. Karam sued Lane in Florida state court for civil theft, fraudulent inducement, and breach of contract, resulting in a default judgment against Lane for $821,771.44, which included treble damages under Florida's civil theft statute.

The bankruptcy court examined whether the Florida default judgment was nondischargeable under 11 U.S.C. § 523(a)(4), which excepts debts for larceny from discharge. Applying Florida's collateral estoppel (issue preclusion) rules, the court found that the elements of civil theft under Florida law were sufficiently identical to the elements of larceny under federal bankruptcy law. The court also determined that, under Florida law, a default judgment—even without the defendant's participation—establishes the truth of all allegations in the complaint and satisfies the "actually litigated" requirement for collateral estoppel. Because Karam was not listed as a creditor and had no notice of Lane's bankruptcy, the debt was not discharged under § 523(a)(3).

The court held that the entire amount of the Florida default judgment, including treble damages and attorneys' fees, was nondischargeable under § 523(a)(4). Lane's counterclaim, which alleged that Karam violated the bankruptcy discharge injunction by pursuing the Florida lawsuit, was dismissed because Karam

had no notice of the bankruptcy and the debt was not discharged. The final judgment excepted the $821,771.44 debt from discharge, reinforcing that debts arising from civil theft under Florida law can be nondischargeable in bankruptcy when the creditor lacked notice of the bankruptcy proceedings.

Owens v. Yiannos (In re Yiannos), 2025 WL 2016493 (Bankr. D. Colo. July 17, 2025)

The One Where the High School Contractor Got a Fresh Start

This case involves a dispute between Justin and Amanda Owens (the Owenses) and Joshua Lambros Yiannos, a young, inexperienced contractor who operated Dream Home Renovations LLC. The Owenses hired Dream Home to perform a major renovation on their Denver home, agreeing to a contract price of $345,910 and paying a $171,290 deposit. Yiannos, who was still in high school at the time, had limited construction experience and no formal qualifications. The contract was poorly drafted, and the Owenses did little due diligence before hiring Yiannos. Work on the project was plagued by issues, including lack of permits, substandard workmanship, and payment disputes with subcontractors. Eventually, the city issued a stop-work order, and the Owenses terminated the contract, demanding the return of unearned funds.

The Owenses sued Yiannos in bankruptcy court, seeking to have the debt owed to them declared nondischargeable under three provisions of the Bankruptcy Code: § 523(a)(2)(A) (false pretenses or fraud), § 523(a)(4) (fraud or defalcation while acting in a fiduciary capacity), and § 523(a)(6) (willful and malicious injury). The court found that while Yiannos made false statements about being licensed and bonded, the Owenses' reliance on these statements was not justifiable given the obvious red flags and their lack of investigation. Regarding the fiduciary duty claim, the court held that Yiannos' conduct was negligent but did not rise to the level of defalcation under the heightened standard set by the Supreme Court, as he was unaware of his fiduciary obligations. The court also found no evidence of willful or malicious intent to harm the Owenses.

Ultimately, the court concluded that although Yiannos and Dream Home breached the contract and owed the Owenses a debt (the exact amount undetermined but between $40,115.04 and $124,122.74), the Owenses failed to meet their burden to prove that the debt was nondischargeable under any of the asserted Bankruptcy Code provisions. The court emphasized that bankruptcy law favors giving a "fresh start" to honest but unfortunate debtors and that exceptions to discharge must be narrowly construed. As a result, the debt owed by Yiannos to the Owenses was deemed dischargeable, and judgment was entered in favor of Yiannos on all claims.

Mey v. Phillips (In re Phillips), 2025 WL 1671667 (Bankr. M.D. Tenn. June 12, 2025)

The One with Strict Liability and False Oaths

This case involved Diana Mey, a consumer advocate, seeking to have a $1.5 million judgment for robocall violations declared nondischargeable in bankruptcy against Judson Wheeler Phillips and John Preston Thompson. Mey had previously obtained the judgment in West Virginia federal court, which found the defendants and their companies liable for violating the Telephone Consumer Protection Act (TCPA) and the West Virginia Consumer Credit and Protection Act (WVCCPA) through repeated, unsolicited telemarketing calls. The judgment included statutory damages and attorneys' fees, based on findings that the defendants' companies were their alter egos and had engaged in a joint enterprise.

Mey argued that the debt was nondischargeable under 11 U.S.C. § 523(a)(6) as a "willful and malicious injury," and also sought to deny the defendants' discharges under § 727(a)(4)(A) for making false oaths by omitting business interests in their bankruptcy filings. The court found that the statutory violations were based on strict liability and did not require proof of intent to injure. Mey failed to prove that the robocalls were made with the subjective intent to harm her, as required by § 523(a)(6); any injury was incidental to an alleged fraud scheme, which was not proven. The court also held that evidence of intent to commit fraud or generalized business misconduct did not satisfy the high standard for "willful and malicious injury."

Ultimately, the court denied Mey's claim to except the judgment debt from discharge under § 523(a)(6) for both defendants. However, regarding the denial of discharge under § 727(a)(4)(A), the court found that Phillips knowingly and fraudulently omitted active business interests from his bankruptcy filings, demonstrating reckless disregard and fraudulent intent, and thus denied his discharge. In contrast, Thompson's omissions were deemed honest mistakes related to largely inactive businesses, and he promptly amended his filings when notified, so his discharge was granted. The decision underscores the strict standards for non-dischargeability and denial of discharge in bankruptcy, requiring clear evidence of intent and materiality.

Parker v. Martin (In re Parker), 141 F.4th 583 (4th Cir. 2025)

The One Where Reliance on Third-Party Advice Defeats Embezzlement Claim in Bankruptcy

This case involved a dispute over the distribution of estate funds following the deaths of Morton Poindexter and Peggy Martin, who had executed a "Post Marital Agreement" providing that two-thirds of their combined estate would go to Dan Martin and one-third to Deborah Parker and her brothers. After

Peggy's death, Morton designated Deborah as a joint account holder on his financial accounts. Upon Morton's death, Deborah, after consulting with the bank and disclosing the existence of both the will and the agreement, was advised that as a joint account holder she was entitled to the funds. Relying on this advice, Deborah liquidated the accounts.

Dan Martin sued Deborah in Virginia state court for breach of contract and won a judgment against her. Deborah subsequently filed for bankruptcy, and Dan initiated an adversary proceeding, arguing that his judgment was nondischargeable under 11 U.S.C. § 523(a)(4) for embezzlement. The bankruptcy court found in Dan's favor, holding that Deborah's actions constituted embezzlement. However, the district court reversed this decision, finding that Deborah lacked the fraudulent intent required for embezzlement because she acted in good faith based on the bank's advice. Dan appealed this reversal to the Fourth Circuit.

The Fourth Circuit affirmed the district court's decision, emphasizing that embezzlement under § 523(a)(4) requires proof of fraudulent intent—specifically, an intent to defraud, deceive, or act in bad faith. The court found that Deborah's full disclosure to the bank and her reliance on their advice established a good-faith belief that she was entitled to the funds, negating the element of fraudulent intent. As a result, the court held that Dan's judgment against Deborah was dischargeable in bankruptcy, as the evidence did not support a finding of embezzlement.

Manion v. Strategic Funding Source, Inc. (In re Manion), 667 B.R. 473 (BAP 9th Cir. 2025)

The One Where the Debtor's Fraudulent Omission Made His Debt Non-Dischargeable

This case involved an appeal from Manion (Debtor), who sought to discharge a debt owed to Strategic Funding Source, Inc. (doing business as Kapitus) in bankruptcy. Manion, through his company Draft Bars, entered into a factoring agreement with Kapitus after Anheuser-Busch terminated Draft Bars' lucrative contract to operate mobile bar units ("bar pods") at out-of-state events. Manion did not disclose this loss of business to Kapitus during negotiations, despite providing financial statements that reflected income from the Anheuser-Busch relationship. Draft Bars soon defaulted on the agreement, and Manion filed for bankruptcy, prompting Kapitus to seek a determination that the debt was nondischargeable due to fraud.

The bankruptcy court found, and the Bankruptcy Appellate Panel affirmed, that Manion's omission of the loss of the Anheuser-Busch business constituted a fraudulent omission under 11 U.S.C. § 523(a)(2)(A). The court held that an omission is distinct from a "statement" about financial condition (which would fall under § 523(a)(2)(B)), and that Manion had a duty to disclose the loss of the Anheuser-

Busch contract because it was a "basic fact" material to the transaction. The court further determined that the omitted information was material, as a reasonable person would have considered it important in deciding whether to enter into the factoring agreement. The court rejected Manion's arguments that Kapitus could have discovered the information independently and that his omission was not material.

The Bankruptcy Appellate Panel affirmed the bankruptcy court's judgment, holding the debt to Kapitus nondischargeable under § 523(a)(2)(A) due to Manion's fraudulent omission. The decision clarifies that under Ninth Circuit law, a debtor's failure to disclose material facts—when there is a duty to do so—can support a finding of nondischargeability for actual fraud, even if the omission relates to the debtor's financial condition. The case underscores the importance of full disclosure in business transactions, especially when entering into agreements that rely on the financial viability of the parties involved.

Stein v. United States (In re Stein), 665 B.R. 320 (Bankr. W.D. Ky. 2024)

The one where specific intent is not required to prove a lawyer/pizza guy debtor intentionally evaded payment of his taxes. "Keep the change, ya filthy animal."

Debtor was a successful plaintiff's attorney with a wife of thirty years, four children in private school, and four homes. Though his legal practice was lucrative, he borrowed significant funds to begin a pizza business, which ultimately failed. During this time, the debtor always filed his taxes but never paid them. In fact, the debtor accumulated over $1 million in unpaid federal income taxes over a 14-year period. Debtor then began to operate in cash only and titled his assets in family members' names. He made various deals with IRS over the years but also concealed assets and never began his repayment plans. His marriage dissolved at the height of his tax issues, and several years later in 2021, the debtor filed his chapter 7 case seeking to discharge his tax liability.

The IRS opposed discharge, arguing that debtor's actions satisfied both the conduct and mental state components of § 523(a)(1)(C). Debtor argued his inability to pay was due to life circumstances and not an avoidance of his tax responsibilities, as evinced by his timely filing each year and his on-going communications with the government.

The court noted that in the Sixth Circuit, "the government must prove, by a preponderance of the evidence, that the debtor (i) engaged in evasive conduct; and (ii) acted with knowledge or deliberation in that evasion. *Id.* at 557-58; *United States v. Storey*, 640 F.3d 739, 744-45 (6th Cir. 2011). The standard of proof notwithstanding, because an exception to discharge is a harsh remedy, actions brought to achieve this end should be 'strictly construed in favor of the debtor.' *Storey*, 640 F.3d at 743.

Ultimately, the court found ample evasive conduct by the debtor and so focused its analysis on the mental state requirement needed to except the tax liability from discharge. The court held that specific intent to defraud the IRS was not required, but rather only that the debtor's actions were voluntary and intentionally committed to evade the tax payments. Because debtor failed to pay his taxes while prioritizing spending on discretionary expenses (like $300k+ in school tuition), because he took steps to conceal his income by using cash only and traveling great distances to pay his debts in cash, because he titled assets in other's names to conceal assets from the government, and because he promised to pay the IRS with funds from a forthcoming settlement, but then failed to do so, the court found the requisite intent and denied discharge.

Chase v. U.S. Department of Education (In re Chase), 2024 WL 5098316 (Bankr. D. Me. Dec. 12, 2024)

The one where the court differentiates between the hard life of lawyers and an "undue hardship."

Debtor graduated college with a degree in economics and then went on to law school and became an attorney. These degrees left him with around $120,000.00 in student loans. After finding the practice of law to be "too stressful," he moved to New York and began work in the fashion industry, where he made between $50,000.00 and $92,000.00 per year during a five-year period. In March of 2020, debtor returned home to Maine to focus on carpentry and remodeling houses, a profession he enjoys. He now makes, on average, $20,000.00/annually. He has repaid approx. $43,000.00 of his student loans and reached an agreement with the Department of Education but still owed $80,000.00. Debtor filed a chapter 7 case solely to seek discharge of his student loans. He admitted that he could afford as much as $250/mo. in payments; but also admitted his repayment amount might be as low as $0/mo. under an income-driven repayment plan wherein he might also eventually qualify for loan forgiveness. Debtor did not prefer this avenue as he was concerned that he would owe taxes on the discharge of indebtedness, which might impact his credit.

The court applied the *Brunner* factors and held that any "undue hardship" experienced by debtor was self-imposed by way of his lifestyle preferences. While understanding of debtor's desire to live a less stressful life in a rural town near his friends, the court concluded he could not enjoy those benefits and also enjoy a discharge of his debt.

Reed v. Branom (In re Branom), 666 B.R. 770 (Bankr. E.D. Tenn. 2025)
The One Where Fraudulent Nondischargeability Followed a Default Judgment

Plaintiff purchased a home from Defendants, who executed a Residential Property Disclosure Form and Sales Contract affirming no known defects. After closing, Plaintiff discovered significant water damage, structural settling, and other hidden defects that Defendants had actively concealed. Plaintiff sued in Ohio state court, and after an evidentiary hearing at which Defendants did not appear, obtained a $67,500 default judgment, including punitive damages for fraud. The state court made detailed findings that Defendants had actual knowledge of the defects and fraudulently failed to disclose them with intent to mislead Plaintiff.

In the subsequent Chapter 7 bankruptcy, the bankruptcy court granted summary judgment for Plaintiff, holding that the state court's findings satisfied the elements of actual fraud under 11 U.S.C. § 523(a)(2)(A). The court applied collateral estoppel, finding the default judgment—based on express factual findings after an evidentiary hearing—precluded relitigating of the fraud issues and rendered the debt nondischargeable under §523(a)(2)(A).

Garcia v. U.S. Dept of Educ. (In re Garcia), 670 B.R. 484 (Bankr. W.D. Tex. 2025)
The One Where Hardship Wasn't Hard Enough

The court considered whether Belinda Ana Garcia's student loan debt could be discharged in bankruptcy due to "undue hardship" under 11 U.S.C. § 523(a)(8). Garcia, who accumulated nearly $100,000 in student loan debt over several decades, argued that her financial situation made repayment impossible without sacrificing a minimal standard of living. She cited her modest income, responsibility for her granddaughter, and various personal hardships as reasons for discharge.

The court applied the Brunner test, which requires the debtor to prove: (1) inability to maintain a minimal standard of living if forced to repay the loans, (2) that this situation is likely to persist due to circumstances beyond the debtor's control, and (3) that the debtor made good faith efforts to repay the loans. The court found Garcia failed all three prongs. Evidence showed she could afford reduced payments under certain income-driven repayment plans by adjusting her budget, such as reducing her car and entertainment expenses. The court also noted that her financial situation could improve when her granddaughter reached adulthood and that Garcia had not demonstrated any external, persistent barriers to higher income or lower expenses.

Ultimately, the court concluded that Garcia's circumstances did not meet the demanding standard for "undue hardship." She had not maximized her income, minimized her expenses, or made substantial efforts to repay the loans beyond deferring them. The court emphasized that even if both parties agreed to discharge, it was obligated to make an independent determination. As a result, Garcia's student loan debt was deemed non-dischargeable, and her request for relief was denied.

COMPENSATION

In re Staker, 667 B.R. 556 (Bankr. S.D. Ohio 2025)

The One on Trustee Commission Entitlement Under § 326(a) When No Assets Are Distributed

This case involved a debtor, Donna J. Staker, who initially filed for Chapter 7 bankruptcy. The appointed Chapter 7 trustee investigated whether the debtor's beneficial interest in a family trust was property of the bankruptcy estate and thus available to creditors. During this process, the debtor moved to convert her case to Chapter 13, citing increased income. The trustee objected, arguing that the trust interest should be administered for creditors and raising concerns about the debtor's good faith and the feasibility of a 100% repayment plan under Chapter 13.

The court addressed two main compensation issues: whether the Chapter 7 trustee was entitled to statutory compensation under 11 U.S.C. § 326(a) despite no asset disbursement, and whether the trustee's counsel could be paid for legal services rendered pre-conversion. The court held that, under the plain language of §§ 326(a) and 330(a)(7), a Chapter 7 trustee is not entitled to a commission unless funds are actually distributed to creditors. The court rejected alternative theories such as quantum meruit and the "composite trustee" approach, emphasizing that statutory language controls and that no commission is due if no assets are disbursed.

While denying the trustee's compensation, the court allowed attorney fees for the trustee's law firm, as an administrative expense in the Chapter 13 case. The court found that the legal services provided—primarily investigating the trust and litigating related issues—were necessary, reasonable, and provided a tangible benefit to the estate, as they led to a 100% dividend plan for unsecured creditors. The court distinguished between non-compensable trustee duties and compensable legal work, ultimately awarding $4,457 in attorney fees as an allowed administrative claim, to be paid through the confirmed Chapter 13 plan.

In re Metschan, 2025 WL 1355650 (BAP 9th Cir. May 9, 2025)
The One Addressing Trustee and Professional Compensation Under §326 and 330

This case centers on the administration of a Chapter 7 bankruptcy estate following the divorce of Philip James Metschan and Christina Shay. The trustee, appointed under 11 U.S.C. § 704(a), was responsible for collecting and reducing estate property to money and objecting to improper claims if a purpose would be served. The trustee employed an attorney and an accountant under § 327 to assist with these duties. The main asset was Metschan's interest in the Pinheiro Property, and the estate's administration was complicated by disputes over Shay's proof of claim, which included both priority and general unsecured components under § 507(a)(1), and by the trustee's efforts to sell the property under § 363.

The trustee, attorney, and accountant each sought compensation from the estate. Trustee compensation is governed by § 326(a), which sets a cap based on a commission structure, and § 330(a)(7), which requires the court to treat the compensation as a commission. Compensation for professionals is governed by § 330(a)(1), which allows "reasonable compensation for actual, necessary services," but prohibits payment for unnecessary duplication or services not reasonably likely to benefit the estate (§ 330(a)(4)(A)). Shay objected to the fee applications, arguing that the professionals performed duplicative work, failed to exercise reasonable billing judgment, and that the attorney performed tasks that were the trustee's statutory duties, in violation of § 328(b), which bars attorneys from being compensated for work that is the trustee's responsibility.

The Bankruptcy Appellate Panel affirmed the trustee's and accountant's fees, finding no abuse of discretion under the standards set by §§ 326 and 330, and noting that, absent extraordinary circumstances, trustee fees should generally be approved. However, the Panel reversed and remanded the attorney's fee award, holding that the bankruptcy court failed to determine whether the attorney's services were compensable legal work as required by § 330(a) and not merely the performance of the trustee's statutory duties under § 704(a). The Panel emphasized that § 330(a)(4)(A) prohibits duplicative or unnecessary services and that professionals must exercise reasonable billing judgment, especially when the cost of services is disproportionately large compared to the estate's probable recovery. The case was remanded for the bankruptcy court to apply these statutory standards more rigorously to the attorney's fee application.

In re TBH19, LLC, 668 B.R. 881 (B.A.P. 9th Cir. 2025)
The One Where the Trustee and Pros Get Paid More Than the Unsecured Creditors

TBH19, LLC, whose main asset was a heavily over-encumbered Beverly Hills property. After the case was converted from Chapter 11 to Chapter 7, the appointed trustee, with the help of his professionals, negotiated a settlement with the senior secured creditor. This resulted in a $3.75 million "carveout" from the property sale proceeds, designated for administrative expenses and distributions to unsecured creditors. The trustee and his professionals voluntarily agreed to reduce their fees to ensure at least $700,000 would be distributed to unsecured creditors.

A group of unsecured creditors (the HAR Parties) objected to the final fee applications of the trustee and his professionals, arguing that the requested fees were excessive and disproportionate compared to the distribution to unsecured creditors. They contended that the professionals' fees should not exceed half of the carveout and that the trustee's statutory commission should be reduced due to "extraordinary circumstances." The bankruptcy court, however, found that the case was unusually complex and contentious, and that the trustee's and professionals' efforts were essential in generating any recovery for unsecured creditors. The court held that, absent extraordinary circumstances, trustee fees calculated under the statutory formula are presumed reasonable, and a mere disproportion between fees and creditor distributions does not, by itself, constitute such circumstances.

The Bankruptcy Appellate Panel affirmed the bankruptcy court's approval of the final fee applications. The panel clarified that the fact that a trustee and professionals receive more than unsecured creditors does not automatically justify a reduction in their fees. The court emphasized that trustee compensation under 11 U.S.C. § 326(a) is presumptively reasonable unless extraordinary circumstances are proven, which was not the case here. The panel also found that the professionals' services were reasonable, necessary, and likely to benefit the estate at the time rendered, and that the bankruptcy court did not abuse its discretion in approving the requested fees.

CONVERSION

In re Swartz, 2025 WL 1809134 (Bankr. E.D. Pa. June 30, 2025)
The One Where the Trustee Lost the Valuation Battle

Debtors filed for Chapter 7 bankruptcy, seeking relief from substantial unsecured debt while aiming to protect their specially adapted family home. Prior to filing, the Debtors obtained a professional appraisal valuing their property at $584,000 and claimed exemptions under 11 U.S.C. § 522(d)(1), believing there

was little to no non-exempt equity. After the Chapter 7 trustee asserted the property was worth $750,000 and intended to liquidate it for creditors' benefit, the Debtors moved to convert their case to Chapter 13 pursuant to 11 U.S.C. § 706. The trustee objected, alleging bad faith and arguing the Debtors could not satisfy the "best interests of creditors" test under 11 U.S.C. § 1325(a)(4).

At an evidentiary hearing, the court evaluated the competing property valuations and the Swartzs' good faith under the standards set by *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), and relevant sections of the Bankruptcy Code. The court credited the Swartzs' certified appraiser, who conducted a thorough analysis, over the trustee's less detailed real estate agent. The court found the property's value to be $584,000, as claimed by the Debtors, and determined there was no significant non-exempt equity after applying the exemptions allowed by § 522(d)(1). The court also found no evidence of bad faith under the standards of § 706 and *Marrama*, noting the Debtors' transparency and the timing of their motion to convert only after the trustee's intent to sell the home became clear.

The court overruled the trustee's objection and granted the Debtors' motion to convert to Chapter 13, finding that they met the eligibility requirements of 11 U.S.C. § 109(e) and could propose a feasible plan as required by § 1325(a)(6). Alternatively, the court noted that the Debtors could remain in Chapter 7 and protect their home, as there was no non-exempt equity to administer. The decision criticized the trustee's approach as lacking diligence and unnecessarily burdensome, emphasizing that the Bankruptcy Code is designed to provide honest debtors with a fresh start, not to subject them to needless litigation when statutory requirements are met.

In re Conway, 2025 WL 1361627 (Bankr. W.D. Wis. May 9, 2025)
The One Where He Gave Her the House (and Lost the Exemption)

A married couple, the Conways, filed for Chapter 7 bankruptcy after a series of financial setbacks, including failed business dealings and litigation with a creditor, Greenwich Business Capital, LLC. The Conways had owned a home in Madison, Wisconsin, which they purchased using proceeds from a previous property. In anticipation of litigation from Greenwich due to defaulted loans, George Conway, on the advice of his attorney, quitclaimed his interest in the property to his wife, Ellen, making her the sole owner. The property was later sold, but due to a disputed UCC filing by Greenwich, the sale proceeds were held in escrow by Commonwealth Land Title Insurance Company under a Secured Indemnity Agreement, pending resolution of the title issue.

The main legal issue was whether both George and Ellen Conway could claim a homestead exemption in the proceeds from the sale of their home under Wisconsin law. The court found that George Conway could not claim the exemption because he had relinquished all ownership interest in the property

before it was sold, as evidenced by the quitclaim deed and his communications with the mortgage lender. The court rejected arguments that George retained an interest through marital property rights or by contributing to the property's purchase and maintenance, emphasizing that ownership at the time of sale is determinative for the exemption.

The court's analysis also touched on the Supreme Court's decision in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), which addressed a debtor's right to convert a Chapter 7 case to Chapter 13. In Marrama, the Supreme Court held that a debtor's right to convert is not absolute and may be denied if the debtor has engaged in bad faith conduct. In the Conway case, the debtors sought to convert their Chapter 7 case to Chapter 13 after the Trustee objected to their exemptions. The court considered the guidance from Marrama, noting that conversion can be denied where there is evidence of bad faith or abuse of the bankruptcy process. However, the primary focus of the court's decision was on the exemption issue, and it ultimately denied Mr. Conway's exemption claim while upholding Mrs. Conway's, finding no evidence of bad faith sufficient to deny her the exemption. The case illustrates the interplay between exemption rights, property transfers prior to bankruptcy, and the standards for conversion under Marrama.

The court ruled that only Ellen Conway was entitled to claim the homestead exemption in the sale proceeds, as she was the sole owner and occupant at the time of sale and credibly testified to her intent to reinvest the funds in a new homestead. The court also determined that the escrow arrangement with Commonwealth did not deprive her of her exemption rights, as the funds were only temporarily held to resolve the title issue. The decision underscores the importance of clear ownership and intent in claiming homestead exemptions and highlights the court's liberal construction of such statutes in favor of debtors, provided statutory requirements are met.

DISMISSAL

In re Schwendt, 669 B.R. 566 (Bankr. N.D. Fla. 2025)

The One Where Post-Petition Income Triggered Dismissal Under § 707(b)

The court granted the U.S. Trustee's motion to dismiss Amanda Elizabeth Schwendt's Chapter 7 bankruptcy case. The debtor filed for Chapter 7 relief in October 2024, claiming unemployment and negative disposable income. However, evidence showed that just before filing, she received a job offer at $60 per hour and began working two days after filing, resulting in a significant increase in her income.

The court analyzed the case under 11 U.S.C. § 707(b), which allows dismissal of a Chapter 7 case if granting relief would be an abuse, particularly when the debtor has the ability to pay creditors. Although Schwendt's initial schedules did not trigger a presumption of abuse under the means test, the court

considered her post-petition income under the "totality of the circumstances" test in § 707(b)(3)(B). The court found that her new income would allow her to repay all unsecured debts within 36 months under a Chapter 13 plan, making her continued pursuit of Chapter 7 relief abusive.

The court concluded that Schwendt's ability to pay her debts outweighed other factors, such as her spouse's disability, prior unemployment, and lack of job security. The court also noted inaccuracies in her bankruptcy schedules and questioned her credibility regarding her financial disclosures. As a result, the court granted the motion to dismiss the Chapter 7 case unless Schwendt voluntarily converted to Chapter 13 within 14 days, emphasizing that her financial circumstances no longer justified Chapter 7 relief.

In re Row NYC LLC, 2025 WL 1361992 (Bankr. S.D.N.Y. May 9, 2025)
The One Where the Court Said No to Dismissal Under § 707(a)

Row NYC, LLC, a non-operating limited liability company, filed for Chapter 7 bankruptcy in January 2023 after ceasing business operations in March 2020 and defaulting on its lease. The company's main creditor, Ames Associates, LLC, had obtained a judgment for unpaid rent and later settled its claim, withdrawing from the bankruptcy case. The Chapter 7 trustee, Deborah Piazza, initiated an adversary proceeding to recover alleged fraudulent transfers totaling approximately $2.1 million from the debtor's affiliates and insiders. After Ames withdrew its claim, Row NYC moved to dismiss the bankruptcy case, arguing that with only a small tax claim remaining, there was no legitimate bankruptcy purpose in continuing the case.

The Debtor contended that the only parties who would benefit from the ongoing case were the trustee and her professionals, as any recovery from the adversary proceeding would largely go to pay their fees, with any remainder returning to the Debtor's parent company. The trustee opposed dismissal, arguing that dismissal would prejudice creditors, including administrative claimants like the trustee and her professionals, who would have no recourse outside bankruptcy. The court emphasized that dismissal of a Chapter 7 case is only permitted for "cause" and must be in the best interests of all parties in interest, not just the debtor. The court found that the debtor, as an LLC ineligible for discharge and with no ongoing business, had little interest in dismissal, while creditors and administrative claimants would be prejudiced by being denied potential recoveries.

The court denied Row NYC's motion to dismiss, holding that the debtor failed to establish cause under section 707(a) of the Bankruptcy Code. The court found that the minimal benefit to the debtor from dismissal was substantially outweighed by the prejudice to creditors and administrative claimants, especially given the trustee's ongoing efforts to recover assets for the estate. The court also noted the debtor's delay in seeking dismissal, which came more than two years after the bankruptcy filing and after

significant judicial and trustee resources had been expended. As a result, the Chapter 7 case will continue, allowing the trustee to pursue potential recoveries for the benefit of all parties in interest.

PROPERTY OF THE ESTATE

In re Taylor, 2025 WL 961610 (Bankr. W.D. Tex. Mar. 31, 2025)

The One With the Stock Options: Pre-Bankruptcy Work v. Post-Bankruptcy Paycheck

The court addressed whether stock options granted to a debtor before filing for Chapter 7 bankruptcy, but vesting after the petition date, belong to the bankruptcy estate or to the debtor. Ryan Andrew Taylor received restricted stock units (RSUs) from his employer, with a vesting schedule requiring continued employment over three years. At the time of filing for bankruptcy, some options had vested, while the final tranche would only vest if Taylor remained employed post-petition. The Chapter 7 trustee sought to compel Taylor to turn over the proceeds from the final tranche of options that vested after the bankruptcy filing.

The court analyzed the issue under 11 U.S.C. § 541, which defines property of the bankruptcy estate, and § 541(a)(6), which excludes from the estate "earnings from services performed by an individual debtor after the commencement of the case." The court found that while the unvested options were a contingent property interest of the estate as of the petition date, the actual value realized from the options depended on Taylor's post-petition employment. The court adopted a pro-rata approach, allocating the value of the final tranche between prepetition and post-petition employment periods. The portion attributable to prepetition work belonged to the estate, while the portion earned through post-petition labor was excluded as the debtor's earnings.

The court granted in part and denied in part the trustee's motion, ruling that Taylor must turn over to the estate the value of the options attributable to prepetition employment, but could retain the portion earned through post-petition work. The decision emphasized the importance of economic realities and statutory language, aligning with the majority of courts that treat post-petition earnings—including stock options earned through continued employment—as excluded from the bankruptcy estate. The ruling also clarified that even if the stock option contract is considered executory and rejected by the estate, the estate retains rights to the value attributable to prepetition services, but not to post-petition earnings.

Sale of Tort Cause of Action

In re Riddle, 2025 Bankr. LEXIS 1950, 2025WL 2381808 (Bankr. D. N.M . Aug. 15, 2025).

The one where the trustee was allowed to sell malpractice claims over the objection of the targets of those claims because they did not have standing to object to the sale.

The chapter 7 trustee filed a motion to sell the debtor's legal malpractice claims to a judgment creditor. The potential targets of the malpractice claim objected and also offered to purchase the malpractice claim. The trustee argued that the objectors lacked standing. The bankruptcy court agreed and granted the trustee's motion to sell. In so holding, the court found that, because the trustee had Article III standing to bring the motion to sell, the court had jurisdiction to decide the motion and the objecting parties need not have constitutional standing. However, because the objecting parties were not creditors and were merely disappointed bidders and targets of the legal malpractice claims, they did not fall within the class of persons protected by section § 363. Accordingly, the court held they lacked standing under the Bankruptcy Code to object to the sale.

INVOLUNTARY PETITIONS

In re Berger, 669 B.R. 323 (Bankr. W.D. Ark. 2025)

The One Where the Debtor Attempted to File an Involuntary Petition Against Himself (Could I *Be* Filing An Involuntary Bankruptcy Against Myself?)

Travis Berger filed an involuntary bankruptcy petition in the United States Bankruptcy Court for the Western District of Arkansas, naming himself—albeit with a variation in the capitalization of his name—as both the petitioning creditor and the alleged debtor. Berger argued that after a legal name change, he became a separate entity from his former self and thus could file an involuntary petition against his prior identity. He also introduced a trust, the "Root 7 Express Trust," as an authorized representative in the proceedings, and cited various non-bankruptcy statutes in support of his position.

The court focused on the requirements of 11 U.S.C. § 303, which governs involuntary bankruptcy cases. The statute requires that the petitioning creditor and the alleged debtor be distinct entities. The court found that Berger's attempt to separate himself into two legal entities through a name change did not satisfy this requirement, as both the creditor and debtor were, in reality, the same individual with the same social security number. The court emphasized that an involuntary bankruptcy must involve some element of duress, force, or coercion, none of which were present in Berger's self-initiated filing.

The court dismissed the involuntary bankruptcy petition, holding that an individual cannot act as both the petitioning creditor and the alleged debtor in an involuntary bankruptcy case. The court further noted that Berger's filing was, in substance, a voluntary petition, and that all other requests for relief were rendered moot by the dismissal. This case reaffirms the principle that involuntary bankruptcy proceedings require separate parties and cannot be used as a procedural tool by individuals seeking to obtain bankruptcy relief for themselves under the guise of an involuntary case.

EXEMPTIONS

Schofield v. Cady (In re Cady), 669 B.R. 907 (Bankr. S.D. Ga. 2025)

The One Where the Debtor's BMW Isn't a Tool of the Trade

Debtor, Nell Cady sought to claim her BMW as a "tool of the trade" under Georgia's bankruptcy exemption statute, O.C.G.A. § 44-13-100(a)(7). Cady argued that her vehicle was essential for her work as a realtor, as she needed it to show properties, attend inspections, and meet clients. She claimed three exemptions in the BMW: the $5,000 motor vehicle exemption, a $10,517 wildcard exemption, and a $1,500 "tools of the trade" exemption. The Chapter 7 Trustee objected only to the "tools of the trade" exemption, contending that a vehicle does not qualify under Georgia law.

The court examined the statutory language and the historical context of Georgia's "tools of the trade" exemption, tracing it back to early 19th-century statutes and Supreme Court of Georgia decisions. The court found that historically, "tools of the trade" referred to small, handheld instruments or simple, inexpensive appliances used directly in manual trades. The court also noted that Georgia's exemption statute provides a separate, more generous exemption specifically for motor vehicles, suggesting the legislature did not intend for vehicles to be included as "tools of the trade." The court reviewed conflicting bankruptcy court decisions but ultimately relied on the narrow, traditional interpretation established by Georgia's highest court.

The court concluded that, under Georgia law, a motor vehicle—even if essential to the debtor's occupation—does not qualify as a "tool of the trade" for purposes of the exemption. The court sustained the Trustee's objection, allowing Cady to claim only the motor vehicle and wildcard exemptions in her BMW, but not the additional "tools of the trade" exemption. This decision limited the amount of proceeds from the vehicle sale that Cady could retain, reinforcing the traditional, restrictive view of what constitutes a "tool of the trade" under Georgia bankruptcy law.

REAFFIRMATION

In re Siriphokha, 2025 WL 1745018 (Bankr. M.D. Fla. June 20, 2025)

The One Where the Court Says No to Reaffirming Sports Car Loan

The Debtor had purchased a 2022 Toyota GR Supra with a loan from credit union, and at the time of her Chapter 7 bankruptcy filing, she owed $60,709.77 on the vehicle, which was valued at $46,525. The proposed reaffirmation agreement required the Debtor to pay $1,131.77 per month for 67 months at 8.25% interest, a payment that constituted about 23% of her monthly income. The Debtor's monthly expenses, including this payment, nearly equaled her income, leaving her with a minimal surplus.

The court analyzed the reaffirmation agreement under 11 U.S.C. § 524, which requires that such agreements be in the debtor's best interest and not impose an undue hardship. The court noted that reaffirmation agreements are not favored under bankruptcy law due to the risk of creditor coercion and the potential to undermine the debtor's fresh start. In this case, the court found that the debt to be reaffirmed significantly exceeded the value of the collateral (the Toyota), leaving a substantial portion unsecured. Additionally, the high monthly payment would consume a large portion of the Debtor's income, creating financial strain.

Ultimately, the court disapproved the reaffirmation agreement, concluding it was not in the Debtor's best interest. The court emphasized that while the Debtor remains free to voluntarily repay the discharged debt if she chooses, she is not legally obligated to do so, and the debt is discharged. The decision reinforces the principle that bankruptcy is intended to provide debtors with a fresh start, and courts will scrutinize reaffirmation agreements to ensure they do not jeopardize the debtor's financial recovery.

CLAIMS ALLOWANCE

Effect of Allowance in Subsequent Litigation- § 502(a)

Thermal Surgical, LLC v. Brown, 2025 U.S. App. LEXIS 20085, 2025 WL 2263862 (2d Cir. Aug. 8, 2025)

The one where the Second Circuit held that allowance of a claim may not be used offensively in subsequent litigation.

Former employer sued employee in the U.S. District Court for the District of Vermont alleging breach of non-compete agreement, breach of duty of loyalty, and misappropriation of trade secrets. While the suit was pending, the employee filed a chapter 7. The employer filed a proof of claim in the amount of $315,000. Neither the debtor not the trustee objected to the claim. Importantly, the debtor waived his right

to a discharge. The trustee distributed $12,620.47 to plaintiff. The automatic stay was lifted to allow plaintiff to resume the litigation in the district court. The plaintiff sought summary judgment for the balance of the claim allowed in the bankruptcy court. The district court ultimately granted the plaintiff's motion for summary judgment finding that claim preclusion applied. On appeal, the Second Circuit reversed. It noted that claim preclusion "prevents parties from raising issues that could have been raised and decided in a prior action, even if they were not actually litigated." The court questioned but did not decide whether claim preclusion could be used offensively. Instead, even assuming that claim preclusion could be used offensively, the court held that applying it in this case would be "unfair." The court noted that the debtor's incentive to object to the claim in the bankruptcy court was quite different from his incentives in the district court litigation. Although the debtor had waived the discharge, he had little incentive to object to the claim because the estate was balance sheet insolvent. In other words, the debtor had no hope of recovering proceeds from the administration of the bankruptcy estate. In fact, because the debtor had waived his discharge and was already being pursued by the creditor in the district court, the debtor had every incentive to maximize the creditor's recovery from the bankruptcy estate to minimize his exposure in the pending litigation.

In re BV Management LLC, 2025 WL 1942986 (Bankr. E.D. Va. July 15, 2025)

The One Where Claimants Amend Their Claims Late and the Trustee's Final Report Gets a Plot Twist.

BV Management LLC filed for bankruptcy under Subchapter V of Chapter 11 in May 2022, later converting to Chapter 7 after failing to file required schedules and statements. The case involved various creditors, including G2 BVM, LLC and The Fred R. Gumbinner Living Trust (the "G2 Claimants"), who filed secured claims based on loans to the debtor. The Chapter 7 Trustee, Janet M. Meiburger, ultimately filed a Final Report proposing distributions to unsecured creditors, treating the G2 Claimants' claims as fully secured and thus not entitled to a share of the estate's unsecured distributions.

Initially, the G2 Claimants' proofs of claim listed their claims as secured, with the value of the collateral either unknown or left blank. As the case progressed, it became clear that the value of the collateral was much less than the amount owed, leaving a significant unsecured deficiency. On the eve of the hearing on the Trustee's Final Report, the G2 Claimants filed amended claims, specifying the collateral's value and asserting large unsecured deficiency claims. The Trustee and another creditor objected, arguing that these amendments were untimely and would unfairly reduce the distribution to other unsecured creditors.

The court analyzed whether the amended claims constituted new, late-filed claims or permissible amendments to timely claims. Applying the relation-back doctrine and relevant bankruptcy rules, the court found that the amended claims arose from the same transactions as the original claims and were not new claims. The court also considered whether allowing the amendments would unduly prejudice the estate or other creditors. It concluded that while the amendments would reduce the expected distribution to other creditors, this did not constitute legal prejudice sufficient to disallow the amendments, especially since no distributions had yet been made and there was no deadline for amending claims.

The court sustained the G2 Claimants' objection to the Trustee's Final Report, holding that their amended claims should be allowed as unsecured deficiency claims. The Trustee was directed to revise the Final Report to account for these claims, which would significantly affect the distribution of estate assets among unsecured creditors. The decision clarifies that, in Chapter 7 cases, timely filed secured claims may be amended to assert unsecured deficiencies, even late in the process, so long as no undue prejudice results and no distributions have been made. This ruling underscores the importance of accurately classifying and amending claims in bankruptcy proceedings.

Removal of Panel Chapter 7 Trustee- 11 U.S.C. § 324(a)

Schoenmann v. United States Trustee, 2025 Bankr. LEXIS 902, 2025 WL 1066799 (9th Cir. BAP April 8, 2025).

The one where the chapter 7 trustee was booted from the panel.

The trustee had been a chapter 7 panel trustee since 1997. Her husband was once financially successful but began to deteriorate mentally and physically after their marriage. He died in 2018, but before his death (2016), he terminated his wife's right of survivorship in four pieces of real estate. Later that same year he and his wife signed a post marital agreement that restored her survivorship rights. After the husband's death, his children by a prior marriage challenged the validity of the post marital agreement in probate court. After a ten-day bench trial, the probate court issued a decision that "laid out a harrowing tale of [the trustee's] abuse, intimidation, and manipulation of [her husband] while he was in desperate mental, emotional, and physical condition." The court held that post marital agreement invalid.

To make matters worse, three weeks before the trial the trustee obtained a $925,000 Covid-19 Economic Injury Disaster Loan and pledged the disputed real estate as collateral. She failed to disclose the pending litigation and represented that her title to the property was not disputed and that the properties were free of claims by third properties. She then used about half of the loan proceeds to pay her legal fees and most of the remaining funds for personal expenses rather than as working capital.

The U.S. Trustee filed a motion with the bankruptcy court to remove the trustee as a panel trustee and from all cases. She vigorously opposed the removal disputing the allegations and contending that, even if true, her personal conduct did not amount to cause for her removal. After a hearing the bankruptcy court granted the motion. The trustee appealed.

The 9th Circuit BAP affirmed. Section 324(a) of the bankruptcy code states that the court "may remove a trustee, other than the United States trustee, or an examiner, for cause." The court noted that "cause" is "an expansive and sweeping word". "Cause" "is determined on a case-by-case, totality-of-circumstances approach, subject to the bankruptcy court's broad discretion." The court rejected the trustee's argument that "cause" must be something related to the trustee's work as a bankruptcy trustee. "[I]f a trustee engages in misconduct that calls into question his or her integrity and trustworthiness or that, if repeated in a bankruptcy case, could harm the interests of the estate and its creditors, the creditor should be free to take preemptive action."

The BAP opinion is currently on appeal before the 9th Circuit.

ETHICAL CONSIDERATIONS IN BANKRUPTCY PRACTICE

Kevin D. Balkwill
ETHICS LAW

Upholding high ethical standards in the representation of clients, practice before the courts, and dealing with opposing parties and counsel is crucial to preserving the integrity of the legal profession and limiting risk which can lead to disciplinary sanctions. This program is designed to cover various ethical topics including:

Conflicts of Interest;
Attorney Fees and Billing;
Law Office Management; and
Use of Generative AI

This program will discuss relevant ethics opinions and cases which touch on ethical responsibilities related to practice in bankruptcy court.

COURSE OUTLINE

Conflicts of Interest

ABA Formal Opinion 494—Conflicts in Personal Relationship w/ Opposing Counsel

NYSBA Opinion 1256—Prosecuting Claims After Lawyer Purchase of Claims from Client

Texas Ethics Opinion 645—Conflicts in Representation (comparison w/ TN RPC 1.7(a)(1))

In Re Black & White Stripes, LLC—US Bankruptcy Court Southern District of NY (2020)

Attorney Fees & Billing

ABA Formal Opinion 505—Fees Paid in Advance (comparison with TN RPC 1.5(f))

In Re Sirios—US Bankruptcy Court Colorado (2024)

Dischargeability of Lawyer Disciplinary Costs—Kassas v. State Bar of California
U.S. Court of Appeals—9th Circuit (2022)

In Re William D. Love—US Bankruptcy Court Middle District TN (2011)

Law Office Management

ABA Formal Opinion 99-414—Departing Lawyers

Tennessee Advisory Ethics Opinion 2000-A-719—Departing Lawyers

ABA Formal Opinion 506—Responsibilities Re: Nonlawyer Assistants

ABA Formal Opinion 507—Office Sharing Arrangements with Other Lawyers

In Re: Amy Elizabeth Hecker—US Bankruptcy Court Eastern District of TN (2022)

Use of Generative AI

ABA Formal Opinion 512—Generative AI Tools

Mid-South State Ethics Opinions & Resources

- Alabama Lawyer—July 2024

- Florida Bar Ethics Opinion 24-1
- Kentucky Ethics Opinion KBA-E-457
- Mississippi Ethics Opinion 267
- Missouri Informal Opinion 24-11
- North Carolina—Use of AI in Law Practice

In Re: Marla C. Martin—US Bankruptcy Court Northern District Illinois

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 494 **July 29, 2020**

Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel

Model Rule 1.7(a)(2) prohibits a lawyer from representing a client without informed consent if there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer. A personal interest conflict may arise out of a lawyer's relationship with opposing counsel. Lawyers must examine the nature of the relationship to determine if it creates a Rule 1.7(a)(2) conflict and, if so, whether the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client who must then give informed consent, confirmed in writing.

To assist lawyers in applying Rule 1.7(a)(2), this opinion identifies three categories of personal relationships that might affect a lawyer's representation of a client: (i) intimate relationships, (ii) friendships, and (iii) acquaintances. Intimate relationships with opposing counsel involve, e.g. cohabiting, engagement to, or an exclusive intimate relationship. These relationships must be disclosed to clients, and the lawyers ordinarily may not represent opposing clients in the matter, unless each client gives informed consent confirmed in writing. Because friendships exist in a wide variety of contexts, friendships need to be examined carefully. Close friendships with opposing counsel should be disclosed to clients, and, where required as described in this opinion, their informed consent obtained. By contrast, some friendships and most relationships that fall into the category of acquaintances need not be disclosed, nor must clients' informed consent be obtained. Regardless of whether disclosure is required, however, the lawyer may choose to disclose the relationship to maintain good client relations.[1]

I. Introduction

The ABA Model Rules of Professional Conduct address conflicts arising when lawyers "closely related by blood or marriage" represent "different clients in the same matter or in substantially related matters." This guidance appears in Comment [11] to Model Rule 1.7, which reads:

> When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. . . . . [A] lawyer related to another lawyer, e.g*., as parent, child, sibling or spouse*, ordinarily may not represent a client in a

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

> matter where that lawyer is representing another party, unless each client gives informed consent. . . .[2]

The Model Rules do not address other types of personal relationships with opposing counsel.[3] But these other personal relationships may also create conflicts of interest. Because changing living patterns suggest that more people are living in households and arrangements that do not correspond to traditional categories,[4] this opinion offers guidance on conflicts that may arise from personal relationships with opposing counsel that fall within the Rules but are not specifically addressed by the Comments. In explaining these obligations, this opinion relies heavily on ABA Formal Opinion 488, issued in September 2019, which addresses judges' personal relationships with lawyers or parties that may require disqualification or disclosure."[5]

Section II below sets out the framework for analysis and identifies three categories of potential relationships between opposing counsel, drawing on the analysis in ABA Formal Opinion

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[2] MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 11 (2020) (emphasis added) [hereinafter MODEL RULES].

[3] By contrast, there is significant authority, from the ABA and elsewhere, addressing business relationships with opposing counsel. For opinions on a lawyer's obligations when negotiating or seeking employment with the opposing firm. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 96-400 (1996); N.C. State Bar Formal Op. 3 (2016); D.C. Bar Op. 367 (2014); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1991-1 (1991); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Advisory Op. 2007-300 (2007); Ky. Bar Ass'n Formal Op. E-399 (1998). There is also significant authority addressing a lawyer's obligations when the lawyer represents or has represented opposing counsel in an unrelated matter. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 97-406 (1997) ("lawyers cannot simultaneously have a lawyer-client relationship and represent third party clients whose interest are adverse if a reasonable lawyer would conclude that his relationship as a lawyer for or client of opposing counsel may materially limit and would adversely affect the lawyer's representation of his 'third-party' client"; opinion discusses when disclosure and consent will permit the representation; "imputation analysis differs for the representing lawyer and the represented lawyer"); Utah State Bar Ethics Advisory Comm. Op. 14-05 (2014) (both affected clients may consent to conflict caused by one's lawyer representing opposing counsel in unrelated malpractice or discipline case); Conn. Bar Ass'n Informal Op. 2012-10 (2012) (personal injury lawyer and insurance defense counsel who are opponents in many cases and one represents the other in unrelated litigation must determine if the representation would materially limit the representation of each lawyer's clients and, if so, must obtain the affected clients' informed consent, confirmed in writing); Me. Prof'l Ethics Comm'n Opinion 205 (2011) (lawyer who is representing opposing counsel in an unrelated matter must determine if there is a significant risk of materially limiting his ability to represent either client and may seek informed consent to continued representation of each client if the lawyer reasonably believes the lawyer can give competent diligent representation to each); N.J. Advisory Comm. on Prof'l Ethics Op. 679 (1995) (conflict of interest caused by lawyer's representation of opposing counsel in unrelated matter may be waived with informed consent); Iowa State Bar Ass'n Ethics & Practice Guidelines Comm. Advisory Op. 92-28 (1993) (lawyer may represent a frequent opposing counsel in an unrelated matter); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 579 (1987) (lawyer may represent opposing counsel in unrelated litigation with client's informed consent if no effect on their independent professional judgment); Ill. State Bar Ass'n Advisory Op. 724 (1981) (no conflict for opposing counsel where one previously represented the other).

[4] For example, according to U.S. Census Bureau data from November 2018,"[t]he median age at first marriage in the United States has continued to rise in recent years." The number of young adults living with an unmarried partner has also increased. For example, "[a]mong young adults 18 to 24, cohabitation is now more prevalent than living with a spouse." *See* U.S. CENSUS BUREAU RELEASES 2018 FAMILIES AND LIVING ARRANGEMENTS TABLES, https://www.census.gov/newsroom/press-releases/2018/families.html (Nov. 14, 2018).

[5] ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 488 (2019) [hereinafter ABA Formal Op. 488].

488. The categories here are: (i) "intimate relationships," (ii) "friendships," and (iii) "acquaintances."[6] This opinion explains the relevant considerations in these circumstances.

II. Analysis

Model Rule 1.7(a)(2) provides that in the absence of informed consent confirmed in writing a lawyer may not represent a client if "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." Comment [11] explains that when opposing counsel are related by blood or marriage "there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment."[7] The Committee concludes that these risks also arise when there are close personal or intimate relationships between lawyers who represent opposing clients. How lawyers should analyze these relationships for purposes of Rule 1.7(a)(2) is discussed below in Sections A, B, and C. There are general principles, however, that apply to all of them.

First, not all personal relationships with opposing counsel create a conflict that would require client informed consent or even disclosure. Some relationships with opposing counsel are so casual that they would not affect a lawyer's independent professional judgment. For other relationships, a lawyer's duty of communication under Rule 1.4 might obligate the lawyer to disclose a relationship, even if the lawyer believes that the relationship would not create a conflict under Rule 1.7. For still other relationships, a conflict based on personal relationships with opposing counsel exists and may be waived if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to [the client]" and the lawyer obtains the affected client's informed consent, confirmed in writing.[8]

The reasonableness of the lawyer's belief will depend on the circumstances. "Reasonable" is defined in Model Rule 1.0(h).[9] For instance, a lawyer's independent judgment is likely to be

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[6] *See id.* at 1, 2, 4-6. Some different considerations affect judicial disclosure and disqualification, e.g. judges must appear to be impartial as well as be impartial in fact, but the categories and considerations set forth in Formal Opinion 488 are useful for lawyers when analyzing their personal relationships with opposing counsel, as described in this opinion.

[7] By contrast, some jurisdiction's rules explicitly address the types of personal relationships discussed in this opinion. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT R. 1.7(c)(2) (2018) (addressing "intimate personal relationship"); IOWA RULES OF PROF'L CONDUCT R. 1.8(i) (2012) (including cohabiting lawyers and lawyers in any "romantic capacity"); OR. RULES OF PROF'L CONDUCT R. 1.7 (2020) (including "domestic partner"); VA. RULES OF PROF'L CONDUCT R. 1.8(i) (2020) (including a lawyer "intimately involved with another lawyer"); WASH. RULES OF PROF'L CONDUCT R. 1.8(k)(1) (2015) (including "intimate relationship with another lawyer"); and W. VA. RULES OF PROF'L CONDUCT R. 1.7 cmt. [11] addressing "sharing living quarters with another lawyer").

[8] MODEL RULES R. 1.7(b)(1). If a lawyer believes that informed consent of a client due to the lawyer's relationship with opposing counsel is required, the lawyer should confer with opposing counsel. If opposing counsel disagrees that informed consent is required, the lawyer should consider whether the issue should be raised with the court if the matter is in litigation, and whether the lawyer has an obligation pursuant to Model Rule 8.3(a) to report opposing counsel. Model Rule 8.3(a) reads: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

[9] Model Rule 1.0(h) reads: "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." *See also* Model Rule 1.0(i) which reads: "'Reasonable

materially limited if due to the personal relationship with opposing counsel the lawyer would refrain from filing a well-founded motion for sanctions against opposing counsel. In that circumstance, the conflict may not be waivable. In addition, if the lawyer's personal relationship is one that is not known to others and the lawyer is therefore hesitant to disclose it to the client, the lawyer may not be in a position to seek the client's informed consent. For example, if the personal relationship with opposing counsel is an affair that the lawyer wishes to keep secret, the lawyer may be unable to comply with the rule's requirements of disclosure and informed consent. In that situation the lawyer is unlikely to be able to commence or continue the client-lawyer relationship.

Second, in determining whether a personal interest conflict exists, the lawyer should consider the lawyer's role in the matter. A lawyer who is sole or lead counsel in a matter is more likely to have a disqualifying conflict than a lawyer who has a subordinate or tangential role, such as researching discrete issues or drafting sections of papers to be filed, where that lawyer has little or no direct decision-making authority in the matter and minimal contact with the opposing counsel.[10]

Third, even when the lawyer has obtained informed consent confirmed in writing from the affected client, the lawyer must not reveal information relating to the representation unless permitted by one of the exceptions in Model Rule 1.6(b). Additionally, such a lawyer must take reasonable measures to assure that no confidential information is inadvertently disclosed to the opposing counsel with whom the lawyer has the personal relationship.[11] Inadvertent disclosure could occur, for example, if papers relating to the representation are left in view or telephone conversations are overheard.

Fourth, if a lawyer undertakes representation in which the lawyer has a personal relationship with opposing counsel and later determines that the lawyer will no longer be able to provide competent and diligent representation to the client because of the personal relationship, the lawyer must withdraw from the representation.[12]

Finally, personal interest conflicts ordinarily are not imputed. As Rule 1.10(a)(1) provides:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant

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belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."

[10] Subordinate lawyers may have to consult with supervisory lawyers in order to withdraw or move to withdraw. A subordinate lawyer, or any other lawyer who is not lead counsel, should disclose the relationship to a supervisor and seek advice on how to proceed in the circumstances, consistent with this opinion. *See also* MODEL RULES R. 5.1 & 5.2.

[11] *See* MODEL RULE R. 1.6(c): "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." *See also* MODEL RULE R. 1.6 cmt. [18].

[12] *See, e.g.*, MODEL RULE R. 1.16(a), which provides in relevant part, "[a] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct . . . ". This obligation to withdraw may arise if a personal relationship develops during the course of a representation.

risk of materially limiting the representation of the client by the remaining lawyers in the firm.

For close family relationships, Rule 1.7, cmt. [11] explains: "[t]he disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated."[13] Similarly, a conflict arising when a lawyer seeks employment with an opposing law firm is not ordinarily imputed.[14] The Committee concludes, as have other ethics committees, that conflicts arising out of the types of personal relationships discussed in this opinion also are not ordinarily imputed under Rule 1.10.[15] Imputation would be appropriate, for example, when other lawyers at either firm also have personal relationships with the opposing counsel or where the personal relationships involve managing partners. In such circumstances, the broader ties to the opposing counsel's firm may influence the lawyer's independent judgment.

A. Intimate Relationships

Lawyers who cohabit in an intimate relationship should be treated similarly to married couples for conflicts purposes. The same is true for couples who are engaged to be married or in exclusive intimate relationships. These lawyers must disclose the relationship to their respective clients and ordinarily may not represent the clients in the matter, unless each client gives informed consent confirmed in writing, assuming the lawyers reasonably believe that they will be able to provide competent and diligent representation to each client.[16]

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[13] MODEL RULE R. 1.7 cmt. [11].

[14] ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 96-400, at 8 (1996). For situations where the negotiating lawyer's conflict might be imputed, *see id*. at note 12. *See also* D.C. Bar Ethics Op. 367 (2014).

[15] *See, e.g.*, State Bar of Ariz. Advisory Op. 01-12 (2001) (finding that a conflict created by "romantic relationship" between a public defender and a police officer is not imputed to the entire public defender's office); State Bar of Mich. Op. R-3 (1989) (regarding lawyer spouses (or their firms) representing opposing clients; no imputation unless the lawyer spouses or the lawyers litigating the cases have a personal interest in the outcome of the litigation); N.C. State Bar Formal Op. 2019-3 (2019) (stating that where there is an "ongoing" and "sexually intimate relationship" between a public defender and a prosecutor there is no imputation "so long as the conflict 'does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm [or office]'").

[16] Comment [11] to Rule 1.7 provides in relevant part: "[A] lawyer related to another lawyer, e.g. as parent, child, sibling *or spouse*, *ordinarily* may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent." (Emphasis added.) Opinions from several jurisdictions agree that intimate and cohabiting relationships should be treated like spousal ones. *See, e.g.*, State Bar of Ariz. Advisory Op. 01-10 (2001) (stating that attorney in Legal Defender's Office who is cohabiting with an attorney in the County Attorney's Office may work opposite each other on the same case only if: (i) both attorneys believe that the representation will not be materially limited by their relationship and (ii) both obtain informed consent by the clients; "[t]he conflict created by the cohabiting relationship is not imputed to other members of the offices"); State Bar of Mich. Op. R-3 (1989) (finding cohabiting lawyers must follow the same rule as lawyer spouses; they may not represent clients who are adverse unless the clients are informed of the relationship and give their consent to the representation; dating lawyers representing adverse parties also have obligations: they should "disclose the relationship to the clients if their relationship is sufficiently close that it could raise questions in the minds of the clients as to whether their interests would be zealously served"; "[l]awyers should err on the side of caution and should disclose such relationships or decline representation . . . if there is any possibility that the clients would consider the existence of the lawyers' dating relationship to be detrimental to the lawyer-client relationship."); N.C. State Bar Formal Op. 2019-3 (2019) (noting that assistant district attorney and criminal defense lawyer in an intimate relationship may not be adversaries in a case unless they disclose the relationship to and obtain written informed consent from the affected clients and the appropriate governmental official).

Opposing counsel who are in some type of intimate relationship, but are not exclusive, engaged to be married or cohabiting, must carefully consider whether the relationship creates a significant risk that the representation of either client will be materially limited by the lawyers' personal relationships.[17] The prudent course would be to disclose to the affected clients and obtain their informed consent.[18]

B. Friendships

Friendships may be the most difficult category to navigate. On the one hand, an adversary may be a dear and longtime friend or someone with whom the lawyer regularly socializes. On the other hand, an adversary may be considered a "friend" even though contact is occasional, brief, or superficial. As noted in ABA Formal Opinion 488:

> 'Friendship' implies a degree of affinity greater than being acquainted with a person . . . the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others.[19]

Failure to disclose intimate relationships and secure adequate consents can result in discipline, disqualification or other significant consequences. A conviction may be reversed. *See* People v. Jackson, 213 Cal. Rptr. 521, 522 (3d Dist. Ct. App. 1985) (reversing conviction; defense counsel failed to inform defendant of his "dating" relationship with the prosecutor; the two "appeared as counsel in directly adverse roles representing defendant and the People respectively at the preliminary examination, at the pretrial settlement conferences, and at trial"); Commonwealth v. Stote, 922 N.E.2d 768, 778 (Mass. 2010) (Marshall, C.J.) (denying reversal after evidentiary hearing, and noting, "[w]e remind members of the bar of their professional obligation under rule 1.7(b) [analogous to M.R. 1.7(a)(2) and (b)(1)&(4)] to disclose to their clients any intimate personal relationship that might impair their ability to provide untrammeled and unimpaired assistance of counsel."). Fees may be forfeited. *See* DeBolt v. Parker, 560 A.2d 1323 (N.J. 1988) (finding lawyer spouses represented adverse interests; fees allowed but only after finding adequate disclosure and consent under then NJ RPC 1.8(i): "[a] lawyer related to another lawyer as parent child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship").

[17] *See, e.g.*, State Bar of Mich. Op. R-3 (1989) (opposing counsel who are dating but not cohabiting or engaged must determine whether the relationship is sufficiently close to require disclosure to and informed consent of affected clients); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 660 (1993) ("a couple who date frequently" may not appear opposite one another in a criminal case; "a dating relationship between adversaries is inconsistent with the independence of professional judgement required by [the New York Rules]"; "whether other lawyers [in defense counsel's firm] will be disqualified depends on the facts and circumstances"). *See also* ABA Formal Op. 488, *supra* note 5, at 6-7 (discussing judges' close personal relationships).

[18] This opinion does not address personal relationships involving previous marriages or cohabitations, engagements, and exclusive dating arrangements that have ended. Adversaries in such situations, however, must also determine pursuant to Rule 1.7(a)(2) whether there is "a significant risk that the representation of one or more clients will be materially limited" by the lawyer's prior relationship with opposing counsel and act accordingly. *See also* ABA Formal Opinion 488, *supra* note 5, at 6 (stating that "close personal relationships" include "an amicable divorce" and being a "godparent" of a lawyer's or party's child). This opinion also does not address when an existing relationship between opposing counsel ends during the course of the representation. The lawyer whose relationship ends while the representation continues must analyze whether the lawyer's new circumstances create a significant risk that the representation of the client will be materially limited by the change in the relationship and, if so, whether the lawyer must disclose the new circumstances to the affected client and obtain the client's informed consent to continued representation. A factor to be considered would be whether the breakup is amicable or hostile.

[19] ABA Formal Op. 488, *supra* note 5, at 4. In addition, as noted in footnote 11 of Formal Opinion 488, "[s]ocial media, which is simply a form of communication, uses terminology that is distinct from that used in this opinion. Interaction on social media does not itself indicate the type of relationships participants have with one another either

Close friendships with opposing counsel should be disclosed to each affected client and, when circumstances require as described further below, their informed consent obtained. ABA Formal Opinion 488 provides guidance here, too. The following are indicia of friendships that would require disclosure and, ordinarily, informed consent:

> [Lawyers who] exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues . . . [or] share confidences and intimate details of their lives.[20]

By contrast, friendships that might require disclosure to the affected clients but will not ordinarily require consent from clients include lawyers who "once practiced law together [and] may periodically meet for a meal when their busy schedules permit or, if they live in different cities, try to meet when one is in the other's hometown."[21] Similarly, adversaries who "were law school classmates or were colleagues years before [and] may stay in touch through occasional calls or correspondence, but not regularly see one another"[22] will typically not require the consent of affected clients and may not even require disclosure. Whether either consent or disclosure is required depends on the lawyer's considered judgment as to whether Model Rule 1.7(a)(2) applies and, if so, whether the lawyer reasonably believes the lawyer can competently and diligently carry out the representation notwithstanding the conflict.

In sum, opposing lawyers who are friends are not *for that reason* alone prohibited from representing adverse clients. The analysis turns on the closeness of the friendship. If there is a significant risk that the representation of one or more clients will be materially limited by a lawyer's relationships, the lawyers must disclose the relationship to each affected client and obtain that client's informed consent, confirmed in writing, assuming the lawyers reasonably believe they will be able to provide competent and diligent representation to each affected client. If the lawyers cannot do so, one or both of the lawyers must decline or withdraw from the affected representations, consistent with Model Rule 1.16.

C. Acquaintances

Acquaintances are relationships that do not carry the familiarity, affinity or attachment of friendships. Lawyers, like judges, "should be considered acquaintances when their interactions . . . are coincidental or relatively superficial, such as being members of the same place of worship, professional or civil organizations, or the like."[23] Lawyers who are "acquaintances" may see each other at such gatherings, even frequently, without feeling a close personal bond. They might regularly meet at bar association or other business events, present continuing education programs together, or serve on bar association committees or boards together where their relationships may be collegial but not necessarily fall into the category of a "friend" that could materially limit the lawyer's independent professional judgment on behalf of a client. Similarly, lawyers who

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generally or for purposes of this opinion. . . . The proper characterization of a person's relationship with an opposing counsel depends on the definitions and examples used in this opinion."

[20] ABA Formal Op. 488, *supra* note 5, at 4.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 4.

regularly see each other at civic or social events but do not make any particular effort to seek each other's company do not have the type of close personal friendship requiring disclosure and informed consent. Again, as described in ABA Formal Opinion 488, the following without more do not create a close personal relationship:

> [Lawyers] might both attend bar association or other professional meetings; they may have represented co-parties in litigation. . .; they may meet each other at school or other events involving their children or spouses; they may see each other when socializing with mutual friends; they may belong to the same country club or gym; they may patronize the same businesses and periodically encounter one another there; they may live in the same area or neighborhood and run into one another at neighborhood or area events, or at homeowners' meetings; or they might attend the same religious services. . . . Generally, neither . . . seeks contact with the other, but they greet each other amicably and are cordial when their lives intersect.[24]

Lawyers who are acquaintances of opposing counsel need not disclose the relationship to clients, although the lawyer may choose to do so. Disclosure may be advisable to maintain good client relations. It may be helpful to inform a client that the lawyer has a professional connection with opposing counsel and then explain how that will not materially limit the lawyer's objectivity but may, in fact, assist in the representation because the lawyers can work collegially.

III. Conclusion

A lawyer's personal relationship with opposing counsel may create a conflict under Model Rule 1.7(a)(2). Lawyers must examine the nature of the relationship to determine if there is a significant risk that lawyer's representation of the client will be materially limited by the lawyer's personal relationship and, if so, whether the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client and each affected, who must then give informed consent, confirmed in writing.

Using the guidelines in this opinion, lawyers should evaluate whether the relationship is a close personal or intimate relationship, a friendship, or the adversary is merely an acquaintance. Cohabiting, intimate and similar relationships with opposing counsel must be disclosed, and the lawyers ordinarily may not represent clients in the matter, unless each client gives informed consent confirmed in writing. Because friendships exist in a wide variety of contexts, friendships need to be examined closely. Close friendships with opposing counsel should be disclosed to clients and, where appropriate, as discussed in Part IIB, their informed consent, confirmed in writing, obtained. By contrast, some friendships and most relationships that fall into the category of acquaintances need not be disclosed, nor is clients' informed consent required. Regardless of whether disclosure is mandated, however, the lawyer may choose to disclose the relationship. Disclosure may even be advisable to maintain good client relations.

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[24] *Id.*

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
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New York State Bar Association
Committee on Professional Ethics

Opinion 1256 (05/26/2023)

Topic: Lawyer purchasing claims from clients of his law firm through a company he owns and then prosecuting those claims by retaining the law firm, or by retaining another law firm with which the lawyer has no affiliation.

Digest: A lawyer may not purchase claims through a company he owns from clients of a law firm where the lawyer is employed and then prosecute those claims by retaining the law firm. Whether a lawyer can purchase claims through a company he owns from clients of a law firm where the lawyer is employed, and then prosecute those claims by retaining another law firm with which the lawyer has no affiliation is not expressly governed by the New York Rules of Professional Conduct. Assuming such conduct is not illegal under Judiciary Law section 488, it is subject to the provisions of Rule 1.8(a), which govern business transactions with clients.

Rules: 1.8(a), 1.8(i), 8.4(a).

FACTS:

1. The inquirer is employed by a law firm in which he has no ownership interest. The firm's practice includes litigation against insurance companies that have denied or disclaimed insurance coverage. Rather than engage the firm to pursue such coverage claims on behalf of the insureds, some clients would prefer to sell and assign their claims outright to the law firm for an agreed price.

QUESTIONS:

2. The inquirer asks if a company he owns can purchase denied insurance claims from clients of the law firm where he is employed and then retain that law firm to litigate those claims?

3. If not, may a company that the inquirer owns purchase the denied insurance claims and retain another law firm with which the inquirer has no employment affiliation to litigate on behalf of the company?

OPINION:

4. Rule 1.8(i) of the New York Rules of Professional Conduct provides that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client." That provision prevents the inquirer from purchasing, on behalf of a corporation he owns, the denied insurance claims of clients of the law firm where he works, and then retaining that law firm to litigate those claims. See also Restatement Third, The Law Governing Lawyers § 36 ("Forbidden Client–Lawyer Financial Arrangements")(discussing the prohibition in Rule 1.8(i)).

5. While it is a question of law beyond the scope of our jurisdiction, the inquirer should also consider whether the proposed conduct violates the prohibitions in Judiciary Law section 488, entitled "Buying demands on which to bring an action." See Judiciary Law § 488(1) ("An attorney or counselor shall not…[d]irectly or indirectly, buy, take an assignment of or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.").

6. The inquirer's second question is whether a company he owns can purchase the denied insurance claims and retain another law firm with which the inquirer has no employment affiliation to litigate the claims on behalf of the company. While this conduct is not expressly governed by Rule 1.8(i), we note that "[a] lawyer or law firm shall not…violate or attempt to violate the Rules of Professional Conduct…through the acts of another." Rule 8.4(a).

7. Assuming that the purchase of a client's denied insurance claim, with the intent to prosecute that claim through another law firm, is not illegal under the provisions of the Judiciary Law and other substantive law, it would be subject to Rule 1.8(a), which governs business transactions with clients. See N.Y. State 1231 (2021) (an estate-planning lawyer who has an interest in a nonlegal financial management company that the lawyer hopes to recommend to estate-planning clients must comply with Rule 1.8(a)). Rule 1.8(a)(1) requires that the terms of the transaction be "fair and reasonable to the client." Furthermore, "the terms of the transaction [must be] fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client." Rule 1.8(a)(1). Rule 1.8(a)(2) requires that the client be advised in writing of the desirability of seeking the advice of independent legal counsel on the transaction and be provided with a reasonable opportunity to seek independent counsel. See Rule 1.8(a), Comment [2] ("When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement and the existence of reasonably available alternatives, and should explain why the advice of independent legal counsel is desirable."). Finally, Rule 1.8(a)(3) requires that the client give an "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."

8. While a client need not be independently represented when consummating a business transaction with her lawyer, certain requirements in Rule 1.8(a) are deemed satisfied if independent representation exists. As Comment [4] to Rule 1.8 states:

> If the client is independently represented in the transaction, paragraph (a)(2) is inapplicable, and the requirement of full disclosure in paragraph (a)(1) is satisfied by a written disclosure by either the lawyer involved in the transaction or the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client, as paragraph (a)(1) further requires.

CONCLUSION:

9. A lawyer may not purchase claims through a company he owns from clients of a law firm where the lawyer is employed and then prosecute those claims by retaining the law firm. The question of whether a lawyer can purchase claims through a company he owns from clients of a law firm where the lawyer is employed, and then prosecute those claims by retaining another law

firm with whom the lawyer has no affiliation, is not expressly governed by the New York Rules of Professional Conduct. Assuming such conduct is not illegal under Judiciary Law section 488, it is subject to the provisions in Rule 1.8(a), which govern business transactions with clients.

(06-23)

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 645

September 2014

QUESTIONS PRESENTED

Is it a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer to represent an individual debtor in a bankruptcy proceeding in Texas in which one of the creditors in the proceeding is a client the lawyer currently represents in other bankruptcy and non-bankruptcy matters that do not involve the individual debtor? Would the answer be different if the lawyer represented the creditor in the past in other unrelated matters but does not currently represent the creditor?

STATEMENT OF FACTS

A lawyer is asked to represent an individual debtor in a bankruptcy filing in Texas in which one of the debtor's creditors is a client the lawyer represents as a creditor in other bankruptcy and non-bankruptcy matters, all unrelated to the debtor. The lawyer has examined the debtor's bankruptcy case and the matters in which he represents the creditor and has determined (1) that the debtor's bankruptcy case and the creditor's matters do not involve substantially related matters in which the debtor's interests are materially and directly adverse to the interests of the creditor and (2) that the lawyer's representation of the debtor will not be adversely limited by the lawyer's or his law firm's responsibilities to the creditor or to a third person or by the lawyer's or his firm's own interests. The creditor has not given consent to the lawyer's representation of the debtor in the bankruptcy case.

DISCUSSION

Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, provides in pertinent part as follows:

> "(a) A lawyer shall not represent opposing parties to the same litigation.
>
> (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
>
> (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests."

Rule 1.06(a) is not implicated because the lawyer will not be representing the creditor in the debtor's bankruptcy case. Rule 1.06(b) is not implicated because, in the facts presented, (1) the debtor's bankruptcy case and the bankruptcy and other matters in which the lawyer represents the creditor do not involve substantially related matters in which the debtor's interests are materially and directly adverse to the interests of the creditor and (2) the lawyer's representation of the debtor will not be adversely limited by the lawyer's or his firm's responsibilities to the creditor or to a third person or by the lawyer's or his firm's own interests. Therefore, under the facts presented, a lawyer representing the debtor in a bankruptcy case in which one of the debtor's creditors is a current client of the lawyer in other matters would not violate Rule 1.06.

The fact that a conflict of interest under Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct is not presented in a bankruptcy case cannot be the end of a lawyer's considerations with respect to conflict of interest issues. Since bankruptcy cases are the exclusive jurisdiction of the federal courts, the standards concerning conflicts of interest used in federal courts in Texas, particularly with respect to disqualification, must also be considered. For bankruptcy cases in Texas, standards adopted by the United States Court of Appeals for the Fifth Circuit will apply even when these standards differ from the Texas Disciplinary Rules of Professional Conduct. For courts in the Fifth Circuit, including bankruptcy and other federal courts in Texas, the standard used in the case of conflicts of interest concerning a lawyer's current clients differs from that set forth in Rule 1.06 of the Texas Disciplinary Rules. The rule in the Fifth Circuit is that, in the absence of exceptional circumstances (which are not present in the facts considered in this opinion), a lawyer may not be adverse to a current client, except with the consent of both clients, regardless of whether the matters are substantially related and regardless of whether the representation could be expected to be adversely limited in any way by the representation of the adverse party in other matters. See *In re Dresser Industries, Inc.*, 972 F.2d 540 (5th Cir. 1992); *Hill, III, v. Hunt,* No. 3:07-CV-02020-O, 2008 WL 4108120 (N.D. Tex. Sept. 4, 2008). Thus, in a bankruptcy case, a lawyer is not permitted, except with consent of both clients, to represent a debtor if one of the creditors in the case is a client that the lawyer represents in other unrelated matters even when the representation would not violate Texas Disciplinary Rule 1.06. A Texas lawyer in a bankruptcy case who knowingly violated the rule of the federal courts in Texas against representation adverse to another existing client would be violating Texas Disciplinary Rule 3.04(d), which provides, with exceptions not applicable here, that a lawyer shall not "knowingly disobey . . . an obligation under the standing rules of or a ruling by a tribunal . . . ."

In the situation here considered, if the lawyer had in the past represented the creditor, but did not currently represent the creditor in any matter, the rule of the Fifth Circuit on conflicts of interest involving current clients discussed above would not apply and Rule 1.09, rather than Rule 1.06, of the Texas Disciplinary Rules of Professional Conduct would have to be considered. Rule 1.09 provides in pertinent part as follows:

> "(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
>
> (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
>
> (3) if it is the same or a substantially related matter."

Under the facts considered in this opinion, the matters are not substantially related and it does not appear the bankruptcy case representation will involve either questioning the validity of the lawyer's services or work product for the former client or a reasonable probability of a violation of Rule 1.05 concerning protection of confidential client information. Therefore, in this factual situation, representing the debtor when one of the creditors is a former client would not violate Rule 1.09. The rules applied in the Fifth Circuit with respect to a lawyer's representation adverse to a former client are generally similar to the standards of the Texas Disciplinary Rules. See *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992). Thus, under both Rule 1.09 of the Texas Disciplinary Rules and the rules applied in federal courts in the Fifth Circuit, the lawyer, in the circumstances considered, would not be prohibited from representing the debtor in a bankruptcy proceeding involving a creditor that is a former client of the lawyer.

CONCLUSION

A lawyer's representation of a debtor in a bankruptcy case in which one of the creditors is also represented by the lawyer in other unrelated matters would not violate specific provisions of the Texas Disciplinary Rules of Professional Conduct on conflicts of interest if (1) the matters do not involve substantially related matters in which the debtor's interests are materially and directly adverse to the interests of the creditor and (2) the lawyer's representation of the debtor will not be adversely limited by the lawyer's or his firm's responsibilities to the creditor or to a third person or by the lawyer's or his firm's own interests. However, absent consent of both the debtor and the creditor, the lawyer will be prohibited from the representation under the conflict of interest rule concerning representation adverse to a current client applicable to bankruptcy courts and other federal courts in the Fifth Circuit. In contrast, in a case where the creditor is a former client, if the matters involved are not substantially related and the bankruptcy case representation will not involve either questioning the validity of the lawyer's work for the former client or a likely violation of obligations concerning confidential client information, the lawyer's representation of the debtor will not violate either the Texas Disciplinary Rules of Professional Conduct or the rules generally applicable to bankruptcy courts in Texas concerning representation of a current client against a former client.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**FOR PUBLICATION**
	Chapter 11
Black and White Stripes, LLC, *et al.*,[1]	Case No. 20-12439 (MG)
Debtors.	(Jointly Administered)

MEMORANDUM OPINION AND ORDER DENYING DEBTORS' AMENDED APPLICATION TO EMPLOY CUSHNER & ASSOCIATES, P.C., AS DEBTORS' ATTORNEYS

A P P E A R A N C E S:

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Lauren M. Macksoud, Esq.
Stephen G. Della Fera, Esq.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: (1) Black and White Stripes, LLC (3533) and (2) Eastern Canal Film, LLC (8127).

OFFICE OF THE UNITED STATES TRUSTEE
201 Varick Street, Room 1006
New York, New York 10014
By: William K. Harrington, Esq.
Paul K. Schwartzberg, Esq.

MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

Pending before the Court in this jointly administered case[2] is the Amended Application of Black and White Stripes, LLC ("B&W") and Eastern Canal Film, LLC ("Eastern," and with B&W, the "Debtors") to Employ Cushner & Associates, P.C. (the "Cushner Firm" or the "Firm"), as Debtors' bankruptcy counsel.[3] ("Retention Application" or the "Application," ECF Doc. # 28-3.) In support of the Application, the Debtors have submitted: (1) "Amended Affidavit Pursuant to Section 329 of the United States Bankruptcy Code and Rule 2016 of the Federal Rule [sic] of Bankruptcy Procedure," executed by James J. Rufo ("Mr. Rufo") (the "Rufo Affidavit," ECF Doc. # 28-1) and (2) "Subchapter V of Chapter 11 of the Bankruptcy Code Retainer Agreement" (the "Retainer," ECF Doc. # 28-2).[4]

On November 2, 2020, Royal West Property Corp. ("Royal West") and Fosso Bianco Holdings Limited ("Fosso Bianco," and with "Royal West," the "Creditors"), B&W's two largest creditors, filed an objection (the "Creditor Objection," ECF Doc. # 32) to the Retention Application on the basis of (1) the Cushner Firm's former representation of the Principals (defined below) and (2) the Cushner Firm's "questionable conduct in a related state court

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[2] B&W is the debtor in case number 20-12439 and Eastern is the debtor in case number 20-12440. (*See* B&W ECF Doc. # 1; Eastern ECF Doc. # 1.) Pursuant to this Court's Order Directing Joint Administration of Chapter 11 Cases, "[t]he docket in Black and White Stripes, LLC (20-12439) should be consulted for all matters affecting this case." (ECF Doc. # 43 ¶ 5.) Accordingly, unless otherwise specified, references are to the docket in case number 20-12439.

[3] A corresponding amended retention application was filed in the Eastern case as well (Eastern ECF Doc. # 23). References to the Retention Application encompass the applications filed in both cases.

[4] Retention of Debtors' counsel, of course, must be based on section 327 of the Bankruptcy Code and Fed. R. Bankr. P. 2014, and not section 329 and Rule 2016, as Mr. Rufo seemed to believe.

litigation." (Creditor Objection ¶¶ 2–3.) On November 4, 2020, the United States Trustee (the "UST") filed a separate objection (the "UST Objection," ECF Doc. # 34) to the Retention Application. On November 27, 2020, the Debtors filed their Reply to Opposition of Debtors' Amended Applications to Retain Cushner & Associates, P.C., as Counsel to the Debtors. ("Reply," ECF Doc. # 50.)

With the issues having been fully briefed, the Court held a telephonic hearing (the "Hearing") on November 30, 2020, to consider the Retention Application. After hearing from the parties, the Court took the matter under submission. For the reasons explained below, the Court **DENIES** the Retention Application.

I. BACKGROUND

The Debtors' principals are Marco La Villa ("Marco") and Mauro La Villa ("Mauro," and with Marco, the "La Villas" or the "Principals");[5] each is a managing member and fifty-percent membership interest holder of both B&W and Eastern. (*See* List of Equity Security Holders, ECF Doc. # 12; Supplemental Declaration of Mauro La Villa in Further Support of Motion ("Mauro Declaration"), Adv. Proc. No. 20-01247, ECF Doc. # 18 ¶¶ 1–2.) The La Villas develop, write, direct, and produce films and other media for B&W and Eastern. (Mauro Declaration ¶ 22.) B&W is a "Sport Entertainment and Content Production Company," and its primary assets are the rights associated with BLACK AND WHITE STRIPES: THE JUVENTUS STORY (the "Film"), a documentary film about the Italian soccer team, Juventus. (*Id*. ¶¶ 7, 10.) Eastern is an "Entertainment and Creative Services Production and Development Company." (*Id.* ¶ 8.) As discussed more fully below, the Debtors financed the Film in part through loans from their

[5] Marco and Mauro are brothers and are referred to by their first names in order to avoid confusion; no disrespect is intended.

uncle Bruno Mastroprimiano ("Bruno") and their cousin Damien Mastroprimiano ("Damien"). Bruno and Damien are insiders as that term is defined by section 101(31)(B)(vi) of the Bankruptcy Code. (*See id.* ¶ 11.)

On October 15, 2020 (the "Petition Date"), B&W and Eastern each filed a voluntary petition for relief under Subchapter V of Chapter 11 of the Bankruptcy Code. (ECF Doc. # 1.) On October 16, 2020, Charles N. Persing was appointed the Subchapter V Trustee in both chapter 11 cases. (*See* Notice of Appointment of Trustee in a Chapter 11 Subchapter V Case, ECF Doc. # 3.)

A. The Debtors' Request for Injunctive Relief to Stay State-Court Actions Against the Debtors' Principals Is Denied

On October 20, 2020, B&W and Eastern filed an adversary proceeding (the "Adversary Proceeding," Adv. Proc. No. 20-01247) seeking to enjoin Royal West and Fosso Bianco from continuing several New York state court actions (the "State Court Actions")[6] against the Debtors and the Principals for a period of 180 days from the issuance of the injunction. (*See* Complaint for Injunctive Relief (the "Adversary Complaint") ¶ 1, Adv. Proc. No. 20-01247, ECF Doc. # 1.) On October 21, 2020, this Court issued an Order to Show Cause and Temporary Restraining Order why an order should not be entered pursuant to 11 U.S.C. §§ 105(a) and 362(a) extending the automatic stay to the State Court Actions against the Principals. (*Id.*, ECF Doc. # 4.)

[6] Two actions remain pending in state court. *See Fosso Bianco Holdings Ltd. v. Screenplay Bungalow One, LLC and Eastern Canal Film, LLC*, Index No. 653811/2020 (N.Y. Sup. Ct. 2020) (seeking $325,390.96); *Royal West Property Corp. v. Black and White Stripes, LLC, Eastern Canal Film, LLC, Marco La Villa, and Mauro La Villa*, Index No. 654004/2019 (N.Y. Sup. Ct. 2019) (seeking $1,606,000.00). Two related actions have already resulted in judgments being entered against the Debtors and their Principals. *See Fosso Bianco Holdings, Ltd. v. Eastern Canal Film, LLC, Marco La Villa, and Mauro La Villa*, Index No. 651495/2020 (N.Y. Sup. Ct. 2020) (judgment entered in the amount of $251,653.45 against Eastern; judgment entered in the amount of $125,826.72 each against Marco and Mauro); *Fosso Bianco Holdings, Ltd. v. Black and White Stripes, LLC*, Index No. 654240/2019 (N.Y. Sup. Ct. 2019) (judgment entered in the amount of $246,218.36 against B&W).

Royal West and Fosso Bianco filed an opposition (the "Injunction Opposition") arguing that Debtors' bankruptcy filings were merely an attempt by the La Villas to escape their own liability, rather than a legitimate effort to reorganize the Debtors. (*Id.*, ECF Doc. # 12 ¶¶ 56–57.) In support of the Injunction Opposition, Royal West and Fosso Bianco submitted the Declaration of Bruno Mastroprimiano (*id.*, ECF Doc. # 13), the Declaration of Damien Mastroprimiano (*id.*, ECF Doc. # 14), and the Declaration of Stephen G. Della Fera (the "Della Fera Declaration," *id.* ECF Doc. # 15). Attached to the Della Fera Declaration are thirty exhibits, including, most notably: (1) a Loan Deal Memo (the "Royal West Agreement," *id.*, ECF Doc. # 15-4); (2) a promissory note (the "SBO Note," *id.*, ECF Doc. # 15-5) made by Screenplay Bungalow One, LLC ("SBO" or "Screenplay Bungalow One"), in favor of Fosso Bianco, with Eastern as surety; (3) a promissory note (the "B&W Note," *id.*, ECF Doc. # 15-6) made by B&W in favor of Fosso Bianco, with Eastern, Marco, and Mauro as sureties; (4) the Film and Creative Services Agreement between B&W and Eastern ("Creative Services Agreement," *id.*, ECF Doc. # 15-14); (5) images of canceled checks drawn on Eastern's account and payable for rent (*id.*, ECF Doc. # 15-15); and (6) reports by Eastern of services rendered to B&W ("Service Reports," or, referring to one of the Service Reports individually, "Service Report," *id.*, ECF Doc. # 15-17).

Following a hearing on November 2, 2020, the Court entered an order vacating the restraining order that had stayed the State Court Actions against the Principals and denying the Debtors' request for injunctive relief. (*Id.*, ECF Doc. # 19 at 2 (noting that "[i]f the Debtors' Principals want the benefit of the automatic stay, they will need to commence their own bankruptcy proceedings").) On November 25, 2020, the State Court (defined below) in one of the State Court Actions amended a prior discovery order to reflect that additional discovery would proceed only with respect to the individual defendants while the entity defendants would

remain subject to the automatic stay. *Royal West Property Corp. v. Black and White Stripes, LLC, Eastern Canal Film, LLC, Marco La Villa, and Mauro La Villa*, Index No. 654004/2019, NYSCEF Doc. # 50.

B. General Background and Transactions

An understanding of the inter-Debtor relationships, as well as the relationships among the Principals, the Debtors, and the Cushner Firm, is necessary for a resolution of the Retention Application.

1. SBO Note

On August 1, 2018, pursuant to the SBO Note, Fosso Bianco advanced $298,845.00 (the "SBO Principal") to Screenplay Bungalow One, a non-debtor affiliate of the Debtors managed by Marco and Mauro. (*See* SBO Note.) Eastern (but not the La Villas) is a surety under the SBO Note. (*See* SBO Note at 4 § 13 ("[Eastern] hereby irrevocably and unconditionally agrees that if the principal sum of an advance together with accrued interest has not been paid hereunder by the Maturity Date the Surety [Eastern] shall pay the unpaid balance on demand from [Fosso Bianco]").) The SBO Note was executed August 1, 2018, with a maturity date of August 1, 2020, and an interest rate of 6 percent per annum with no interest payable until March 1, 2019. (*Id.* § 3.) The SBO Note is governed by the laws of Alberta, Canada, with consent to jurisdiction in both Alberta and New York. (*Id.* § 9.) It is signed by Marco, Mauro, and Damien. (*Id.* at 6.)

Following SBO's default on the SBO Note, Fosso Bianco filed a motion for summary judgment in New York Supreme Court seeking payment of the SBO Principal plus accrued interest—for an aggregate of $325,390.96—together with additional interest accruing at 6 percent since the maturity date of August 1, 2020, as well as attorneys' fees and costs. (*See* Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment in Lieu of Complaint (the "Fosso Bianco SJ Motion"), 653811/2020, NYSCEF Doc. # 3 at 1, 6.) This case

does not name Marco or Mauro individually. Fosso Bianco alleges that it demanded payment from SBO and Eastern on August 4 and 6, 2020, and that neither defendant has repaid any amount owed under the SBO Note. (*Id.* at 2.) As such, Fosso Bianco argues that it is owed a sum certain based upon an instrument for the payment of money only and is therefore entitled to summary judgment in lieu of complaint pursuant to CPLR § 3213. (*See id.* at 4.) Fosso Bianco also argues that it is owed attorneys' fees by SBO pursuant to the terms of the SBO Note. (*Id.* at 5; SBO Note § 10.)[7] On October 19, 2020, Dentons US LLP ("Dentons"), on behalf of Fosso Bianco, submitted a letter to the court requesting that the court take no action with respect to the Fosso Bianco SJ Motion in light of Eastern's bankruptcy case and section 362(a) of the Bankruptcy Code. (Letter / Correspondence to Judge (the "FBH Letter"), 653811/2020, NYSCEF Doc. # 11.) As of December 4, 2020, there has been no subsequent activity on the state court docket since the filing of the FBH Letter.

2. B&W Note

Pursuant to an additional promissory note, the B&W Note, dated April 5, 2018, Fosso Bianco made three advances, each in the amount of $70,000 (on April 1, 2018, April 23, 2018, and August 1, 2018) to B&W; each advance was to be repaid on or before six months from the date of the advance with interest accruing at a rate of 7 percent per annum. (*See generally* B&W Note; *see* Injunction Opposition ¶¶ 11–12.) Eastern and the La Villas are sureties under the B&W Note, with Marco and Mauro each individually obligated to repay up to 50 percent of any unpaid principal and interest. (*See* B&W Note § 13 ("Marco La Villa and Mauro La Villa shall each be liable to pay to [Fosso Bianco] such unpaid sums up to an amount of no more than fifty

[7] The Fosso Bianco SJ Motion incorrectly cites section 13 of the SBO Note, but section 10 of the SBO Note provides that "Borrower [SBO] shall pay all costs and expenses of the collection of indebtedness evidenced by this note, including reasonable attorneys' fees and court costs in addition to other amounts due, without protest." (SBO Note § 10.)

(50%) each of the applicable advance together with accrued interest thereon.").) None of the $210,000 aggregate principal and accrued interest has been repaid. (Injunction Opposition ¶ 12.)

Fosso Bianco sued for payment of the B&W Note in July 2019,[8] and a default judgment was entered on January 16, 2020, in favor of Fosso Bianco in the amount of $246,218.36. (*Id.* ¶ 14.) B&W lists this amount in its schedules as a "disputed" amount owed to Fosso Bianco. (ECF Doc. # 7-2 at 2.) Following the grant of default judgment against B&W, Fosso Bianco brought an action against Eastern and the La Villas as sureties.[9] (Injunction Opposition ¶ 15.) On October 7, 2020, default judgment was again entered in favor of Fosso Bianco in the amount of $251,653.45, with Eastern responsible for the full judgment amount and Marco and Mauro each responsible for 50 percent (i.e., $125,826.72 each). (*Id.*) This $251,653.45 is listed in Eastern's schedules, also as a "disputed" amount. (*See* Eastern ECF Doc. # 10-2 at 1.)

3. Royal West Agreement

To finance the Film, B&W entered into an agreement with Royal West for equity financing in the amount of $436,090.00 (referred to in the Royal West Agreement as the "Principal Amount") and a loan in the amount of $985,000.00 (the "Loan Amount"), bearing an interest rate of 10 percent per annum, with Eastern and the La Villas as sureties. (Mauro Declaration ¶¶ 11–12; Royal West Agreement at 12–13 §§ 2–3.) Under the Royal West Agreement, Royal West was also to receive an additional payment equaling 15 percent of the Principal Amount. (Royal West Agreement at 14, Exhibit A, *Allocation of Receipts*, ¶ (f) ("Sixth, to the Investor [Royal West] . . . until they have received an additional fifteen percent (15%) on the Principal Amount . . . .").) In contrast to the surety provisions of the SBO Note and

[8] *Fosso Bianco Holdings, Ltd. v. Black and White Stripes, LLC*, Index No. 654240/2019 (N.Y. Sup. Ct. 2019).

[9] *Fosso Bianco Holdings, Ltd. v. Eastern Canal Film, LLC*, Index No. 651495/2020 (N.Y. Sup. Ct. 2020).

B&W Note—which simply oblige the sureties to make payment in the event of the primary obligor's default—as sureties under the Royal West Agreement, Eastern and the La Villas agreed that, until Royal West had received 100 percent of Loan Amount and interest, they would "pay fifty [percent] (50%) of any profit participations received by the Sureties from any existing or future motion picture or other business venture in which any Surety is actively involved to [Royal West] to be applied one hundred percent (100%) to pay down the Loan Amount and then the Interest." (Royal West Agreement at 13 § 3.)

Summary of Claimed Amounts					
Claimant	Against	Instrument	Amount	Status	NYS Case No.
Fosso Bianco	B&W	B&W Note	$246,218.36	Default judgment entered	654240/2019
Fosso Bianco	Eastern as surety	B&W Note	$251,653.45	Default judgment entered	651495/2020
Fosso Bianco	Marco & Mauro as sureties	B&W Note	$125,826.72 each	Default judgment entered	651495/2020
Fosso Bianco	SBO (and Eastern as surety)	SBO Note	$325,390.96	Motion for summary judgment pending	653811/2020
Royal West	B&W (with Eastern, Marco, and Mauro as sureties)	Royal West Agreement	$1,606,000	Pending, stayed as to B&W and Eastern	654004/2019

4. Creative Services Agreement

The Creative Services Agreement includes two components: (1) a "Film & Creative Service Deal Memo," entered into as of June 22, 2011 (the "Deal Memo," Creative Services Agreement at 10–11), and (2) a "Film & Creative Service Agreement," entered into as of October 1, 2015. (*Id.* at 2–9.) Both components of the Creative Services Agreement were entered into by and between Eastern as the "Creator" and B&W as the "Company," with Marco signing each on behalf of Eastern and Mauro signing each on behalf of B&W. (*Id.* at 5, 11.)

Schedule A to the Creative Services Agreement includes a list of the services to be provided (e.g., film production, home video/Blu-ray production, sales & distribution). (*Id.* at 6–8.) Schedule A also sets out the fees to be paid to the Creator. (*Id.* at 9.) The fees are expressed both in terms of a standard billing rate and a "50% DISCOUNTED BILLED RATE." (*Id.*) It is not entirely clear why B&W was to be billed at a discounted rate, nor is it clear how much money Eastern actually received pursuant to the Creative Services Agreement. Eastern did, however, write numerous checks to cover Marco's personal rent over an eight-year period. (*See* Injunction Opposition ¶ 46; Della Fera Declaration, Ex. O (producing sixty-three pages of cancelled rent checks drawn on Eastern's bank account).)

5. Service Reports

The Service Reports describe various production services allegedly provided by Eastern to B&W.[10] (*See generally* Service Reports.) Two such reports have been provided to the Court as attachments to the Della Fera Declaration. (*Id.*) The first report is labeled "#001" and details services rendered through September 30, 2011. (*Id.* at 1.) This initial Service Report shows a balance due of $45,000.00 (reflecting "Total Fees and Disbursements for this period" of $90,000.00, but subject to the Creative Services Agreement's 50% discount). (*Id.* at 2.) The second report, labeled "#022,"[11] details additional production services rendered through

[10] The Creditors assert in their Injunction Opposition that the Service Reports "appear to have been created by Debtors/the La Villas during the [Royal West Action], as their metadata indicates they were created in May 2020." (Injunction Opposition ¶ 28.) A review of the Service Reports themselves, however, makes clear that the Debtors were not trying to hide the relatively recent creation of the Service Reports. The first Service Report includes a prominent disclaimer: "This report is a non-exhaustive list of services provided during the time period covered by this report. Due to restrictions with COVID, certain additional information regarding services provided cannot be accessed at this time. This report may be supplemented at a later date." (Service Reports at 3.) Thus, it is not just the "metadata" that reveals the Service Reports' recent vintage. The Service Reports, while detailing past services rendered, were generated, or at least conspicuously modified, during the litigation process.

[11] It is unclear why the only Service Reports produced during the Adversary Proceeding were numbers 001 and 022, with all interim reports being omitted.

December 16, 2016. (*Id.* at 4.) This second Service Report shows a balance due of $990,000.00 (reflecting "Total Fees and Disbursements for this period" of $90,000.00, again subject to the Creative Services Agreement's 50% discount, added to an outstanding "Previous Balance" of $945,000.00). (*Id.* at 5.)

C. The Cushner Firm's State-Court Representation of the Debtors and Principals

The Cushner Firm represented B&W, Eastern, and the Principals in an action (the "Royal West Action") that was originally filed by Royal West on July 12, 2019, in New York State Supreme Court, and subsequently assigned to the Commercial Division (the "State Court"). ("Royal West Complaint," Index No. 654004/2019,[12] NYSCEF Doc. # 2.) The Royal West Complaint asserts six causes of action including: (1) "Breach of Fiduciary Duty/Accounting" (*id.* at 4); (2) "Fraudulent Concealment by Fiduciary" (*id.* at 5); (3) "Breach of Contract" (*id.* at 6); (4) "Quantum Meruit" (*id.*); (5) "Unjust Enrichment" (*id.* at 7); and (6) "Breach of Obligation To Perform As Surety Against Eastern Canal Film, LLC, Marco La Villa; And Mauro La Villa." (*Id.*)

The defendants in the Royal West Action were initially represented by the law firm Larocca Hornik Rosen & Greenberg LLP ("LHR&G"). (*See* Verified Answer with Affirmative Defenses, NYSCEF Doc. # 9.) Over a year later, pursuant to a stipulation entered August 20, 2020, LHR&G withdrew as counsel for all defendants in the Royal West Action. (NYSCEF Doc. # 16). Royal West and Eastern (the "LLC Defendants") were given until September 11, 2020, to retain replacement counsel or be held in default. (*Id.* ("[I]f replacement counsel for the LLC Defendants (which cannot appear pro se) does not e-file a notice of appearance and

[12] Subsequent references to the Royal West Action will omit the Index Number but use "NYSCEF" citations to avoid confusion with citations to the bankruptcy dockets.

participate in the September 11 call they will be held in default and plaintiff may move for a default judgment against them . . . .").)

On September 4, 2020, the Cushner Firm entered an appearance in the Royal West Action. (Notice of Appearance, NYSCEF Doc. # 17.) The Firm represented the Debtors and the La Villas pursuant to a "Limited Retainer Agreement" (the "State-Court Retainer"). (Reply, Ex. A, ECF Doc. # 50-1). Paragraph one of the State-Court Retainer provides, in relevant part:

> 1. We shall represent you in the foregoing action on September 11, 2020 and we shall also provide such other legal advice, counsel, including review of the entire litigation file and services as may, in our opinion, be necessary or proper in connection with that matter.

(*Id.* ¶ 1.) The Cushner Firm was paid an "initial retainer of $2,500.00" pursuant to the State-Court Retainer. (*See id.* ¶ 3.)

On September 11, 2020, the State Court held a hearing in the Royal West Action and extended deadlines (from August 19, 2020, to September 25, 2020) for certain discovery, *i.e.*, for the parties to finalize an ESI protocol and for the defendants to produce Eastern's bank statements. (*See* Status Conference Order, NYSCEF Doc. # 19.) On September 25, 2020, and after having been made aware of the Cushner Firm's "forthcoming motion for leave to withdraw," the State Court subsequently extended the deadline for producing Eastern's bank statements to October 9, 2020, with a deadline of September 30, 2020, for requesting any records not in the defendants' possession. (Status Conference Order (the "State Court Order"), NYSCEF Doc. # 22 at 1.) The State Court gave defendants a strict directive that failure to comply with the amended schedule would result in the State Court striking the defendants' answer and permitting the plaintiff to move for entry of a default judgment. (*Id.*)

On October 1, 2020, the Cushner Firm filed its Affirmation in Support of Order to Show Cause to be Relieved as Attorney of Record ("Withdrawal Affirmation," NYSCEF Doc. # 25).

The most relevant paragraph of the Withdrawal Affirmation provides: "Without disclosing any attorney-client privileges, significant differences have arisen between my firm and the Defendants as to the communication breakdown and an irrevocable breach has developed." (*Id.* ¶ 6.)

After requesting withdrawal, but prior to the State Court granting it, the Cushner Firm filed Mauro La Villa's Affidavit of Compliance with the State Court Order and produced the Eastern bank statements that were the subject of that order. (NYSCEF Doc. ## 28–31.) On October 13, 2020, Royal West's counsel, Charles Dorkey III, of Dentons, submitted a letter to the State Court arguing that "a default is justified" and alleging that production of Eastern bank records did not "strictly comply" with the State Court Order as they had failed to include, with the exception of a single monthly statement, any records from 2019 or 2020.[13] (Letter / Correspondence to Judge (the "Dentons Letter"), NYSCEF Doc. # 32.) On October 14, 2020, the State Court issued an order requiring Marco and Mauro to submit a letter explaining the failure to "strictly comply" with the State Court Order and reminding them that "the LLC Defendants" (i.e., B&W and Eastern) would be held in default if they failed to retain replacement counsel by October 16, 2020. (NYSCEF Doc. # 36.)

On October 15, 2020, the State Court entered an Order relieving the Cushner Firm as counsel. (NYSCEF Doc. # 37). On the same date, Mr. Rufo of the Cushner Firm, filed a Notice of Bankruptcy Case Filing in the State Court. (Notice of Bankruptcy (Post RJI), NYSCEF Doc. # 39.) On November 25, 2020, the State Court issued an updated discovery order requiring the La Villas to begin complying with the ESI protocol as to their personal email accounts by mid-

[13] Ultimately, it appears that there were no 2020 records as the account was closed in 2019. (Dentons Letter at 2.) The Dentons Letter also raised complaints with respect to the partial redaction of account numbers, which hindered efforts to track disbursement of the funds advanced by Royal West. (*Id.*)

December, with review of corporate emails stayed unless ordered by this Court. (NYSCEF Doc. # 50.)

D. The Cushner Firm's Bankruptcy Court Retention Application

B&W's pending Retention Application seeks to retain the Cushner Firm as bankruptcy counsel to the Debtors. (Retention Application at 1.) The Retention Application replaces a prior retention application that was filed on October 19, 2020, and subsequently withdrawn. ("Withdrawn Application," ECF Doc. # 17.) The primary changes to the Retention Application are to the accompanying Rufo Affidavit, beginning with the deletion of the following paragraph:

> 4. Neither I, nor the Firm or any attorney at the Firm has any connection with the debtor, its creditors or any other party in interest herein or their respective attorney except as described below. Furthermore, neither I, nor the Firm or any attorney at the Firm is a pre-petition creditor of the Debtor.

("Withdrawn Rufo Affidavit," ECF Doc. # 17-1 ¶ 4.) Paragraph 4 was clearly inaccurate as it omits any disclosure of the Cushner Firm's state court representation of the Debtors *and* the Principals. The Retention Application replaces that deleted paragraph with the following:

> 3. Prior to the date of the Debtor's chapter 11 filing on October 15, 2020, the Firm represented the Debtor, the related debtor and debtor-in-possession, Eastern Canal Film, LLC (case no. 20-12440 (MG), and the Debtors' principals Marco La Villa and Mauro La Villa (collectively, the "Principals") in state court litigation matter in the Supreme Court of the State of New York, County of New York, Royal West Property Corp. v. Black and White Stripes, LLC et al, *Index No. 654004/19* (the "State Court Action") pursuant to a general retainer for which The Firm received on or about September 2, 2020.
>
> 4. The Firm represented the Debtors and Principals in the State Court Action from September 3, 2020 until October 15, 2020. The Firm was relieved as counsel for all parties pursuant to an Order signed by the Honorable Jennifer G. Schecter, J.S.C., dated and entered on October 15, 2020.

> 5. On the date that the state court order relieving the Firm was entered, and prior to the date of the Debtors' October 15, 2020 chapter 11 filing, the Debtors and Principals balance owed to the Firm was ZERO.

(Rufo Affidavit ¶¶ 3–5.) Mr. Rufo's affidavits accompanying both the Retention Application and the Withdrawn Application each include the following paragraphs:

> 13. A search of the Firm's computer server containing all existing and prior matters and contacts has been conducted in which we compared a list of the debtors [sic] known creditors, *members*, directors, officers and financial institutions. *No parties were identified as former or current clients of the Firm*, or are in any way related, such that the Firm could not be opposed to them.
>
> 14. In so far as I have been able to ascertain, the Firm is a disinterested part [sic] in the [sic] Section 101(14) of the Bankruptcy Code, holds no interest nor represents any adverse interest to and has no connection to the Debtor, the Debtor's estate, its creditors or any other party or interest or their respective attorneys and accountants with respect to matters for which the Firm is to be engaged, other than as specifically set forth above.

(*Id.* ¶¶ 13–14 (emphasis added); Withdrawn Rufo Affidavit ¶¶ 11–12.) Finally, the Rufo Affidavit, as amended, includes the following paragraph, which reiterates material already set out in paragraph 4, while adding an assertion that the Cushner Firm should not be subject to disqualification:

> 15. Despite the Firm having represented the Debtors and Principals in the State Court Action from September 3, 2020 until October 15, 2020, the [Firm] was relieved as counsel for all parties pursuant to an Order signed by the Honorable Jennifer G. Schecter, J.S.C., dated and entered on October 15, 2020. Therefore, the Firm does not believe that this past relationship would disqualify the firm representing this Debtor; as evidenced by the Debtor's retainer agreement with the Firm.

(Rufo Affidavit ¶ 15; *see id.* ¶ 4.)

The Retention Application states that "[t]he *Debtor* has paid Cushner & Associates P.C. a total sum of $10,217.00 in connection with the commencement of this Chapter 11 bankruptcy"

(Retention Application ¶ 10 (emphasis added)), and the Rufo Affidavit states merely that the Cushner Firm "has received $10,217.00 in connection with the commencement of this Chapter 11 bankruptcy" (Rufo Affidavit ¶ 16). However, Mauro's *Lar-Dan* Affidavit (the "Lar-Dan Affidavit," ECF Doc. # 17-3), attached to the Withdrawn Application, makes clear that *Mauro* "personally paid and guaranteed the fees of $8,500.00 and $1,717.00 for filing fees for a total sum of $10,217.00 paid in connection with the Chapter 11 case." (*Id.* at 1.) The Lar-Dan Affidavit has not been reattached to the Retention Application and thus exists on the docket only as an attachment to the Withdrawn Application.

E. Creditors and UST Argue that Retention of the Cushner Firm Is Improper

Royal West and Fosso Bianco have filed an objection to the Retention Application, as has the UST.

1. Creditor Objection

Royal West and Fosso Bianco object to the Retention Application on two primary grounds. (Creditor Objection ¶¶ 2–3.) First, the Creditors argue that the Cushner Firm's former representation of the La Villas "presents a direct conflict of interest that should preclude the Cushner Firm's representation of [the] estate." (*Id.* ¶ 2.) The Creditors submit that B&W "is likely to have adverse claims, for fraudulent conveyances and other wrongful abuse of the corporate form, against the La Villas, as evidence obtained by Royal West and Fosso Bianco to date indicates that the Debtor's bank accounts were used to pay for the La Villas' personal expenses, including taxis, Ubers, hotels, and meals." (*Id.* ¶ 18.) The Creditors also argue that claims by the Debtors against the Principals would be "substantially related" to claims brought against the Principals in the Royal West Action, in which the Cushner Firm served as counsel to the Principals and the Debtors. (*Id.*) Thus, the Creditors argue, "absent consent of the La Villas, representation of the Debtor by the Cushner Firm would be a violation of [the New York Code of

Professional Responsibility]." (*Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 22 § 1200.27 (2007) ("DR 5-108(a)")).)[14] They submit, however, that even if the La Villas granted a waiver of any professional conduct deficiencies, the more restrictive requirements of section 327(a) would prevent the Debtors' employment of the Cushner Firm. (*Id.* ¶ 19.)

Second, the Creditors argue that "the Cushner Firm's questionable conduct in [the] related state court litigation raises significant concerns about their ability to faithfully represent the Debtor and its estate in this bankruptcy proceeding." (*Id.* ¶ 3.) The Creditors submit that "[the Firm's] appearance [in the Royal West Action] allowed the Debtor and the La Villas to both avoid a potential default and also to obtain additional time to respond to discovery," after which the Firm immediately requested to withdraw as counsel, filed these bankruptcy cases, and argued that the automatic stay protected the La Villas in the Royal West Action. (*Id.* ¶¶ 8–10.) The Creditors argue that this "questionable conduct," which "raise[s] significant concern over [the Cushner Firm's] ability to faithfully represent the Debtor," warrants denial of the Retention Application. (*Id.* ¶ 21.) Finally, the Creditors question B&W's "ability to faithfully engage in the bankruptcy process" and note that appointment of a trustee or examiner may be appropriate in this case. (*Id.* ¶ 22.)

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[14] DR 5-108(a) provides:

> A. Except as provided in DR 9-101 [1200.45] (B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
>
> 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
>
> 2. Use any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19] (C) or when the confidence or secret has become generally known.

2. UST Objection

The UST's arguments track those of the Creditors to the extent that they raise concerns that "the Debtors' principals may be subject to fraudulent conveyance actions as well as claims for abuse of corporate form." (UST Objection at 2.) The UST includes additional specifics with respect to these alleged abuses. (*Id.* ¶ 12.) Citing the Creditors' Injunction Opposition, the UST notes that "$180,000 was inappropriately funneled to the La Villas pursuant to an undisclosed contract in the guise of payments for production, advertising & marketing, sales & distribution services." (*Id.* (citing Injunction Opposition ¶¶ 23–24).) The UST also notes that "[Royal West] and Fosso Bianco state that canceled checks and bank records show that Marco La Villa used funds from Eastern Canal to pay his personal rent, in the amount of over $100,000 over an 8-year period and personal expenditures." (*Id.*) The UST also includes the detail that Mauro La Villa "personally paid and guaranteed the fees of $8,500 and $1,717 . . . in connection with each case." (*Id.* ¶ 8.)

F. Debtors' Counterarguments

The Debtors, by and through the Cushner Firm, filed their Reply on November 27, 2020. (*See* Reply.) The Reply seeks to highlight the limited nature of the Firm's state-court representation of the Debtors and the Principals, noting that that representation was governed by a "Limited Retainer Agreement" (the "State-Court Retainer") and that the Firm's representation was "limited to the facilitation of the production of . . . [Eastern's] bank statements." (*Id.* ¶¶ 18–19, 38; *see also* State-Court Retainer, ECF Doc. # 50-1.) The State-Court Retainer was signed by Marco La Villa on September 1, 2020. (State-Court Retainer at 6.) But by September 24, Todd S. Cushner ("Mr. Cushner") called counsel for Royal West on behalf of the Cushner Firm to inform him "that the Cushner Firm would be withdrawing as counsel for the defendants due to the significance of the State Court Action." (Reply ¶ 22.) In a footnote, Mr. Cushner asserts that

"[his] decision to withdraw from the State Court Action was largely based on the fact that [he] was still recovering from a bicycle accident . . . that resulted in five (5) broken ribs, a punctured lung and a broken collar bone."[15] (*Id.* ¶ 22 n.2 (additionally noting "a recently discovered heart issue").) The Reply goes on to acknowledge some compliance issues with the state-court discovery requirements and to explain these as owing to an "error due to miscommunication." (*Id.* ¶ 31–35.)

The Reply acknowledges that the Creditor Objection raises allegations about the Cushner Firm's "questionable conduct" but asserts that such allegations are "unsupported by fact and contrary to state court orders as demonstrated herewith." (*Id.* ¶ 39.) The Reply does not, however, directly address the apparent inconsistency with its prior assertion in the state court regarding its alleged communication breakdown with the Debtors.

The Reply also acknowledges the objections based on the Firm's complicated position with respect to the potential investigation of claims of "fraudulent conveyance and corporate waste" against its former clients. (*Id.* ¶ 40.) The Reply argues, however, that such objections "are without merit and are largely based on hearsay and unsupported allegations." (*Id.* ¶ 41.) Debtors go on to argue that the Creditors' allegations—that the Principals may be subject to fraudulent conveyance actions—are "not derived from fact but are instead hypothetical causes of action that Creditor alleges may exist." (*Id.* ¶ 49.) Debtors then wonder: "why didn't Creditor pursue these claims in the State Court litigation prior to the Debtors' bankruptcy filings?" (*Id.*) Debtors argue that this perceived failure to raise such claims is an indication that such claims do not exist. (*Id.*) Moreover, Debtors argue, to the extent that any such claims do exist, special litigation counsel could be retained in the bankruptcy proceeding to investigate them. (*Id.*)

[15] While the Court is certainly sympathetic to Mr. Cushner's serious and unfortunate medical issues, they do not relieve his firm from its obligations to its clients, to this Court, and to the State Court.

The Debtors' arguments in favor of permitting the Cushner Firm to represent them focus on the brevity and alleged limited scope of the state-court representation. The Debtors' arguments rely heavily on the Second Circuit's decision in *AroChem*. (*See id.* ¶¶ 50–55 (citing *Bank Brussels Lambert v. Coan (In re AroChem Corp.)*, 176 F.3d 610 (2d Cir. 1999)).) In *AroChem,* the court upheld the retention of a firm as special litigation counsel to represent the debtor in claims against certain creditors after the same firm had already represented an individual creditor against many of those same creditors on substantially similar claims to those sought to be asserted on behalf of the debtor. *See AroChem*, 176 F.3d at 630. The Reply notes that "[t]he *AroChem* court . . . distinguished between past representation, and present and future representation." (Reply ¶ 52.) Because the firm in *AroChem* no longer represented the creditor's interests it was sufficiently "disinterested" to represent the debtor as special counsel. (*Id.* ¶¶ 53–54 (citing *AroChem*, 176 F.3d at 623–24).) Thus, the Debtors argue, because the Cushner Firm no longer represents the Principals and such representation was "extremely limited," the Firm is sufficiently disinterested to represent B&W and Eastern. (*Id.* ¶ 55.)

G. The Hearing

At the Hearing, both Mr. Cushner and Mr. Rufo argued in support of the Retention Application. (*See generally* Hearing at 21:40–23:35.) Lauren M. Macksoud of Dentons and Paul K. Schwartzberg from the U.S. Trustee's Office opposed the Retention Application. (*Id.*)

The Cushner Firm—as it did in the Reply—argued that its State Court representation of the Debtors and the La Villas was narrow in scope and brief in duration. (*See generally id* at 21:40–52:08.) Mr. Cushner argued that the Firm was "retained on a limited basis to attend a hearing on September eleventh regarding the production of documents for Eastern Canal. . . . [P]aperwork—mostly bank statements for Eastern Canal—[was] filed with the court along with a finalized ESI protocol. That was pretty much my extent of representation of the two Debtors in

the state matter." (*Id.* at 24:33–25:06.) The State-Court Retainer does not support Cushner's claim that the scope of the retention was narrow. (*See* State-Court Retainer ¶ 1.)

Mr. Cushner was also given an opportunity to explain the apparent discrepancy between the reasons the Firm gave to the State Court to justify withdrawal and the reasons given for withdrawal in the Reply. Mr. Cushner stated that "[t]he main reason that [he] moved to be relieved as counsel was the extent of the state court litigation and the fact that the Debtors had decided to file for bankruptcy." (Hearing at 26:50–27:02.) He asserted that his understanding—which was reflected in the Firm's retainer amount of only $2,500.00—was that "all that was required [of the Cushner Firm] was a hearing on [September] eleventh for the purpose of providing documentation." (*Id.* at 27:33–28:09.) The Cushner Firm provided that documentation (consisting of the Eastern bank records), as well as an ESI protocol, but when it became apparent that the scope of work required would be greater than anticipated, the Cushner Firm determined that it lacked the ability to handle such an extensive undertaking. (*Id.*)

Mr. Cushner also addressed the issue of potential avoidance claims against the La Villas. He stated that he "believed that the La Villas are going to cooperate in the bankruptcy and provide anything that's required. And, as of right now, there are only allegations of misappropriation or other nefarious activities." (*Id.* at 32:28–32:54.) Mr. Cushner acknowledged that the Debtors paid the rent on an apartment where Marco was living but indicated that the apartment was "partly used for the business." (*Id.* at 33:37–33:50.) Mr. Rufo also argued that "[preference actions] would be preserved in the plan, and, in the event that it is necessary, [the Cushner Firm] would certainly look to retain special counsel to investigate those matters." (*Id.* at 38:50–39:00.)

The Creditors' counsel responded that alleged fraudulent transfer claims possibly total as much as $250,000 (by the Creditors' estimates), and that with relatively minimal other assets, it would be impractical for the estate to retain additional counsel. (*Id.* at 40:10–40:15, 41:35–41:44.) With respect to the scope of work required in the State Court, the Creditors argued:

> [T]he entire purpose of that conference [on September 11, 2020] was for the Debtors—the defendants in the state court action—to establish that they would have counsel going forward in that case. The state court had made clear that the defendants would be held in default if they did not have counsel. At no point did the Cushner Firm advise the state court at the September eleventh conference that its representation was limited to that conference. If they had, we are confident that the state court would have considered that non-retainment of new counsel and would have entered the default.

(*Id.* at 44:32–45:03.)[16]

The UST echoed the Creditors' sentiments that, in a relatively small Subchapter V case, the hiring of special counsel to investigate possible fraudulent transfer would be impractical. (*Id.* at 47:48–47:55.) The UST also argued that the Cushner Firm's receipt of retainer amounts from the La Villas call into question the Firm's ability to pursue fraudulent conveyance allegations against the Principals, particularly when combined with the Firm's prior representation of the La Villas individually. (*Id.* at 47:03–47:48.)

II. LEGAL STANDARD: RETENTION OF PROFESSIONALS UNDER SECTION 327(a) OF THE BANKRUPTCY CODE

Section 327(a) of the Bankruptcy Code governs the employment of professionals to represent the estate during bankruptcy with court approval. *In re Worldcom, Inc.*, 311 B.R. 151, 163 (Bankr. S.D.N.Y. 2004). Section 327(a) provides as follows:

[16] The Creditors also addressed whether counsel other than the Cushner Firm could represent the Debtors given that the Debtors' managing members continue to be the Principals. The Creditors noted that this is "likely the type of case where a chapter 11 trustee would be appropriate." (Hearing at 45:43–45:53.) The Court does not address whether a chapter 11 trustee is necessary or appropriate.

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a).

To be retained under section 327(a), professionals must be both disinterested and not hold or represent any interest adverse to the estate. *Vouzianas v. Ready & Pontisakos (In re Vouzianas)*, 259 F.3d 103, 107 (2d Cir. 2001) (citing *AroChem*, 176 F.3d at 621); *see also In re Project Orange Assocs., LLC*, 431 B.R 363, 369 (Bankr. S.D.N.Y. 2010).

The structure of the Bankruptcy Code distills these dual requirements into a single test for analysis of a conflict of interest. Bankruptcy Code § 101(14)(C) defines a "disinterested person" as one who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C). This definition overlaps with the adverse interest requirement of section 327(a), creating a single test for courts to employ when examining conflicts of interest. *Hogil Pharm. Corp. v. Sapir (In re Innomed Labs, LLC)*, No. 07 Civ. 4778(WCC), 2008 WL 276490, at *2 (S.D.N.Y. Jan. 29, 2008) (citing *Worldcom*, 311 B.R. at 164; *In re Granite Partners, L.P.*, 219 B.R. 22, 33 (Bankr. S.D.N.Y. 1998)). A professional must not "hold or represent an interest adverse to the estate." *See AroChem*, 176 F.3d 622–23 (observing that the "adverse interest" language appears in section 327(a) and in the definitions in section 101 regarding disinterested persons and articulating the relevant test as whether an entity "hold[s] or represent[s] an interest adverse to the estate"); *Innomed Labs*, 2008 WL 276490, at *2 (same); *see also Granite Partners, L.P.*, 219

B.R. at 33 (observing that "the two prongs of section 327(a) are duplicative and form a single test to judge conflicts of interest") (internal citation omitted).

The Second Circuit has defined "hold or represent an adverse interest" as

> (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.

AroChem, 176 F.3d at 623 (quoting *In re Roberts*, 46 B.R. 815, 827 (Bankr. D. Utah 1985), *aff'd in part and rev'd in part on other grounds*, 75 B.R. 402 (D. Utah 1987)).

The test is not retrospective; courts only examine present interests when determining whether a party has an adverse interest. *Id.* at 623–24 (observing that Congress intended only to proscribe those who presently have an adverse interest from representing a debtor under § 327(a)). Generally stated, the adverse interest test is objective and precludes "any interest or relationship, however slight, that would even faintly color the independence and impartial attitude required by the Code and Bankruptcy Rules." *Granite Partners*, 219 B.R. at 33 (quoting *Roberts*, 46 B.R. at 828 n.26); *see also In re Angelika Films 57th, Inc.*, 227 B.R. 29, 38 (Bankr. S.D.N.Y. 1998) ("The determination of adverse interest is objective and is concerned with the appearance of impropriety.") (citation omitted). Further, courts have recognized that a professional has a disabling conflict if it has "either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors—an incentive sufficient to place those parties at more than acceptable risk—or the reasonable perception of one." *Granite Partners*, 219 B.R. at 33 (quoting *In re Martin*, 817 F.2d 175, 180 (1st Cir. 1987)). Thus, disqualification is appropriate "if it is plausible that the representation of another interest may cause the debtor's attorneys to act any differently than they would without that other representation." *In re Leslie Fay Cos.*, 175 B.R. 525, 533 (Bankr. S.D.N.Y. 1994).

Courts determine whether an adverse interest exists by examining the specific facts of each case. *AroChem*, 176 F.3d at 623 ("Whether an adverse interest exists is best determined on a case-by-case basis."); *Angelika Films 57th*, 227 B.R. at 39 (stating that "the determination of counsel's disinterestedness is a fact-specific inquiry"). Bankruptcy courts may consider the interests of the estate and the debtor's creditors, accounting for the expeditious resolution of a case when analyzing a retention order. *Vouzianas*, 259 F.3d at 107 (citing *AroChem*, 176 F.3d at 621). Courts, however, must take the requirements of section 327 seriously, as they ensure that a professional fulfils his or her duties in accordance with his or her fiduciary duties to the estate. *Leslie Fay Cos.*, 175 B.R. at 532 ("The requirements of section 327 cannot be taken lightly, for they 'serve the important policy of ensuring that all professionals appointed pursuant to [the section] tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities.'") (alteration in original) (quoting *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994)). Moreover, courts lack the power to authorize the "employment of a professional who has a conflict of interest." *In re Mercury*, 280 B.R. 35, 55 (Bankr. S.D.N.Y. 2002) (citations omitted).

The existence of claims among multiple debtors (individuals or entities) is scrutinized closely as it relates to representation of multiple parties (creditors and debtors) in reorganization proceedings. A leading treatise notes that "[o]ne problem area that does influence courts to disqualify attorneys or deny their requests for compensation is the potential assertion of intercompany claims among the debtor entities." 3 COLLIER ON BANKRUPTCY ¶ 327.04[5][b] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020). Courts are to review the potential conflicts on a case-by-case basis in connection with claims between debtors. *Id.* (explaining that multiple representation of debtors and/or creditors is not a per se conflict of interest); *see also In*

re Interwest Bus. Equip., Inc., 23 F.3d 311, 314 (10th Cir. 1994) (concluding that bankruptcy court did not abuse its discretion in denying employment of single law firm to simultaneously represent interrelated debtors where debtor-creditor relationship was established as a result of prepetition debts "from one estate to the other").

In *In re JMK Construction Group, Ltd.*, this Court denied retention of a single professional by multiple debtors where the debtors in the group of four related cases may have held claims for contribution against one another and where some of the debtors were creditors of others. *In re JMK Constr. Grp., Ltd.*, 441 B.R. 222, 225 (Bankr. S.D.N.Y. 2010). The affiliated debtors in *JMK* (JMK itself, as well as three individual debtors) each filed voluntary petitions in this Court, motivated to do so by substantial judgments entered against each of them following a jury verdict in the district court. *Id.* at 226. There were additional inter-debtor claims that the parties attempted to waive in order to permit retention of the firm by all parties. *Id.* at 227. The debtors also sought to waive rights of contribution against one another that may have arisen out of the jury verdict. *Id.* at 231. In spite of this purported waiver, however, this Court was unable to conclude that there was no longer a right of contribution, with such right of contribution sufficient to disqualify the firm from representation of all debtors. *Id.* at 233.

III. DISCUSSION

A. The Cushner Firm Is Disqualified from Representing the Debtors Based on Its Representation of the Principals

The Cushner Firm's prior representation of Marco and Mauro precludes it from representing B&W and Eastern in their bankruptcy cases. The Firm has argued that its representation in the State Court was brief and that its scope was adequately cabined by the "Limited Retainer Agreement." (*See* State-Court Retainer ¶ 1.) But this position is belied by the plain terms of the State-Court Retainer, which provides for "review of the entire litigation file

and services as may, in [the Firm's] opinion, be necessary or proper in connection with that matter." (*Id.*) Thus, the scope was not limited by the agreement, and the prior representation of the La Villas creates, at the very least, a potential conflict that precludes the Cushner Firm's representation of the Debtors in this case. Moreover, even on this issue, the Firm's positions have been inconsistent. According to the Rufo Affidavit, the Firm's representation in the State Court was "pursuant to a *general* retainer." (Rufo Affidavit ¶ 3 (emphasis added).)

As the Creditors' counsel noted at the Hearing, the potential avoidance actions against the Principals may ultimately be among the estate's most significant assets. It is therefore imperative that there be no doubt whether counsel for the Debtors can effectively pursue any such actions. The Cushner Firm argues that the viability of avoidance actions is merely speculative at this juncture. The evidence adduced by the Creditors so far hardly makes such claims speculative, but the Cushner Firm's Retention Application is not the time or place to adjudicate such claims. Whether an avoidance action would ultimately succeed is not determinative of whether the Retention Application can be approved. The determining factor is whether counsel sought to be retained can proceed faithfully on behalf of the Debtors and in the best interests of the estate.

The Debtors' Reply relies heavily on the Second Circuit's *AroChem* decision for the proposition that a prior representation of a creditor is not necessarily disqualifying. While it is true that *AroChem* permitted the retention of a firm that had represented one creditor of the debtor in an action against several of the debtor's other creditors, that situation is easily distinguishable. The Debtors acknowledge in their Reply that "*AroChem* involved the retention of special counsel," but they point out that the Second Circuit nevertheless "analyzed the issues

in terms of the requirements of section 327(a)."[17] (Reply ¶ 50.) Missing from the Debtors' analysis, however, is an acknowledgment of just how narrow the proposed scope of representation was in *AroChem*. There, the law firm was retained as special litigation counsel to pursue a specific set of claims against a specific set of defendants, against which it had already asserted substantially related claims on behalf of the debtor's creditor. *See AroChem*, 176 F.3d at 627.

Here, the Debtors seek to retain the Cushner Firm as general bankruptcy counsel in their consolidated chapter 11 cases, not as special litigation counsel to pursue a narrow claim. The Debtors have their analysis backwards. They argue that, because the Firm's "[pre]petition representation of the Debtors' Principals was extremely limited," the Firm should not now be disqualified. (Reply ¶ 55.) But part of what made the representation at issue in *AroChem* permissible was the scope of representation for which the firm was retained *in the bankruptcy case*. In *AroChem*, the special litigation counsel was retained to pursue the same narrow issues it had already pursued on behalf of the creditor. It was not retained to represent all of the debtor's interests. Moreover, *AroChem* was a chapter 7 case where, at the time of the special counsel's retention, the debtor's only remaining assets were its causes of action. *AroChem*, 176 F.3d at 615.

The instant chapter 11 case is in its early stages. It needs reliable bankruptcy counsel to help shepherd the Debtors through the chapter 11 process and to faithfully proceed on their behalf in marshalling estate assets and pursuing any claims that the Debtors may have. The Debtors argue that any allegations of fraudulent conveyances or abuse of the corporate form are merely speculative. The evidence produced thus far (e.g., checks drawn on Eastern's account to

[17] Section 327(e) was inapplicable because the firm sought to be retained had previously represented a *creditor*, not a *debtor*, as contemplated in section 327(e).

pay Marco's personal rent) is hardly speculative. At any rate, it is worrying that proposed counsel would be so dismissive of such claims, especially at this early stage in the case. And it is particularly concerning where these potential claims would be against the Cushner Firm's former clients in the State Court Action, which raised substantially the same issues. However brief the Cushner Firm's role in the State Court Action, that representation undermines the Firm's ability to perform as faithful bankruptcy counsel to B&W and Eastern in their chapter 11 cases. Accordingly, the Retention Application must be denied.

B. The Subchapter V Trustee Must Investigate Certain Important Issues Affecting Inter-Debtor Relationships

The arrangement between B&W and Eastern raises a number of concerns. The Creative Services Agreement and Services Reports indicate a "balance due," as of December 31, 2016, of $990,00.00. (Service Reports at 5.) The amounts due to Eastern by B&W also apparently reflect an unexplained 50 percent discount for all billed amounts. While the Service Reports provide a summary of production-related services rendered by Eastern, the two Reports that have been produced only account for $90,000.00 out of the total amount purportedly due. It is unclear what the basis is for the other $900,000.00 claimed in the Service Reports. It is also unclear how much Eastern has received in the aggregate pursuant to the Creative Services Agreement or what amounts, if any, it may still be owed by B&W. Many checks drawn on Eastern's bank account were paid for Marco's personal rent. There may very well be claims against the Principals arising out of these transactions, but there may also be intercompany claims arising against Eastern in favor of B&W. It is also unclear what assets each Debtor has that will enable each Debtor to satisfy its separate creditor's claims.

Eastern is also a surety on two debts on which B&W has defaulted. With respect to one, default judgment has already been entered against both B&W as the primary obligor and against

Eastern (and the La Villas) as surety. With respect to the other, the action to recover against B&W and Eastern is currently subject to the automatic stay during the pendency of this proceeding. The surety provision in the agreement that is the subject of that second action provides for payment of B&W's defaulted obligation out of the sureties' profit participations in future business ventures. (Royal West Agreement § 3.) If Eastern's reorganization efforts were to involve development of new projects (and counsel indicated at a hearing on November 2, 2020, that such projects were being pursued), that could certainly complicate the joint representation of both Debtors by a single law firm.

The inter-debtor claims and rights of contribution require careful scrutiny. Accordingly, this must be an area of particular focus for the Subchapter V Trustee, and other estate fiduciaries, going forward in this case.

IV. CONCLUSION

For the reasons discussed above, the Amended Application to Employ Cushner & Associates, P.C., as Debtors' Attorneys is **DENIED**.

IT IS SO ORDERED.

Dated: December 4, 2020
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 505 **May 3, 2023**

Fees Paid in Advance for Contemplated Services

Under the Model Rules of Professional Conduct, a fee paid to a lawyer in advance for services to be rendered in the future must be placed in a client trust account and may be withdrawn only as earned by the performance of the contemplated services. This protects client funds and promotes client access to legal services in the event the representation terminates before all contemplated services have been rendered. All fees must be reasonable, and unearned fees must be returned to the client. Therefore, it is not accurate to label a fee "nonrefundable" before it actually has been earned, and labels do not dictate whether a fee has been earned.

This opinion examines a lawyer's obligations under the ABA Model Rules of Professional Conduct with respect to fees paid in advance for legal work to be performed by the lawyer in the future.[1] In particular, this opinion seeks to clarify the proper handling and disposition of fees paid in advance for legal work to be performed in the future, including where the lawyer must deposit and maintain the funds and when the lawyer may treat them as earned. The opinion also explains when a lawyer must refund all or a portion of fees paid in advance and discusses whether such a payment may be, or can even be labeled, "nonrefundable." The answers are derived from the application of several Model Rules, including: 1.5(a), 1.5(b), 1.15(a), 1.15(c), 1.15(d), and 1.16(d).

Fees for services may be paid after completion of the services, of course. However, for certain matters, many lawyers request or require that funds in a certain amount be paid to the lawyer at the outset of the representation to secure payment for the lawyer's later work. Under the Model Rules such fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned. This is to protect the client from the risk that the lawyer may not be able to refund the prepaid fee in the event the representation terminates before the contemplated work is completed. The Model Rules protect the lawyer from the risk of nonpayment by allowing advance fees to be received and protect the client by requiring that the funds are kept safe and separate from the funds of the lawyer or firm.

I. Terminology

As a preliminary matter, it is useful to define terms commonly used to label certain client-lawyer fee arrangements: advances, retainers, flat or fixed fees, and "nonrefundable" or "earned-on-receipt" fees.

[1] This opinion is based on the American Bar Association Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling. This is especially noteworthy for this opinion as jurisdictions have adopted substantially different rules relating to the management of client property including fees paid in advance for legal work to be performed in the future.

A. Advances v. Retainers

Fees paid by a client to a lawyer in advance for legal work to be performed by the lawyer in the future are sometimes referred to as an "advance fee," an "advanced fee," an "advance fee payment," an "advance fee deposit," a "fee advance," or simply an "advance." Advances are also sometimes called "special retainers," "security retainers," or simply "prepaid fees." To be consistent and clear, this opinion will use the term "advance" when discussing fees paid to the lawyer for legal work to be performed in the future.

When a client pays an advance to a lawyer, the lawyer takes possession – but not ownership – of the funds to secure payment for the services the lawyer will render to the client in the future.

This opinion will also refer to the term "retainer" fee. Neither the term "retainer" nor "retainer fee" is found in the Model Rules of Professional Conduct. Regrettably, many lawyers use the term loosely to mean any sum of money paid to the lawyer at or near the commencement of representation.[2] Whereas an advance is a deposit of money with the lawyer to pay for services to be rendered in the future, there is another type of payment that is not for services. Rather, "[t]he purpose of [a retainer] is to assure the client that the lawyer will be contractually on call to handle the client's legal matters."[3] This type of agreement and payment is variously referred to as a "general retainer," "classic retainer," "true retainer," "availability retainer," or an "engagement retainer."[4] Because all of these terms mean the same thing, this opinion will use the term "general retainer" to refer to this arrangement.[5] A general retainer is paid – and deemed earned – upon the promise of availability to represent a client, whether or not services are actually needed or requested by the client.[6] Thus, a general retainer has been conceptualized as a form of an option

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[2] There is widespread agreement that the word "retainer" has been used so inconsistently that is has practically lost all definable meaning. BLACK'S LAW DICTIONARY (11th ed. 2019) ("Over the years, lawyers have used the term 'retainer' in so many conflicting senses that it should be banished from the legal vocabulary.") (quoting Mortimer D. Schwartz & Richard C. Wydick, PROBLEMS IN LEGAL ETHICS 100, 101 (2d ed. 1988)).

[3] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 506 (West 1986).

[4] Some jurisdictions have commendably sought to define terms and draw distinctions in their court rules. *See* Ariz. Rules of Prof'l Conduct R. 1.5 cmt. [7] (*"*The 'true' or 'classic' retainer is a fee paid . . . merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. . . ."). *See also* Fla. State Bar R. 4-1.5(e)(2) (defining "retainer," "flat fee," and "advance fee") and Iowa R. Civ. P. 45.8-10 (defining "general retainer," "special retainer, and "flat fee").

[5] It is sometimes said that retainers come in two varieties: "general retainers" and "special retainers." A special retainer is simply an advance going by another, unfortunately misleading, name. *See* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 5-6 (1993) ("A special retainer is an agreement between lawyer and client in which the client agrees to pay the lawyer a specified fee in exchange for specified services to be rendered. The fee may be calculated on an hourly, percentage or other basis and may be payable either in advance or as billed.") (footnotes omitted). The Committee is of the opinion that a special retainer is the same thing as an "advance." To be consistent and clear, this opinion will use the term "advance" when referring to such arrangements, although some of the cited sources and authorities may use the term "special retainer."

[6] "Because the general retainer is not a payment for the performance of services, but rather is compensation for the lawyer's promise of availability, the fee is earned by the lawyer at the time the retainer is paid and thus should not be deposited into a client trust account. The general retainer is not an advance deposit against future legal services, which instead would be separately calculated and charged should the lawyer actually be called upon by the client to

contract.[7] In other words, hourly time is not billed against a general retainer and a general retainer is not a flat fee for a specific amount of the lawyer's time – it is solely to reserve the lawyer's availability. An important result of these related features is that the money paid by the client in connection with a general retainer should not be placed in a trust account since it is considered earned upon the commencement of the contract.[8]

Some authorities treat the term "general retainer" or "true retainer," etc., as synonymous with "nonrefundable." This is not correct. A general retainer may, by custom, be considered earned when paid, but this does not mean that it is forever exempt from scrutiny under the Rules. It may be determined to be an unreasonable fee, or even unearned if the lawyer does not make himself or herself available. For example, if a company retains a lawyer to handle a hostile takeover bid should one arise and the lawyer does not, in fact, accept the engagement, then the fee, which may have been paid many months earlier and treated as the lawyer's own property, may be determined to be unreasonable and/or unearned and therefore the subject of an order requiring it to be returned, refunded, or repaid to the client. Other circumstances requiring refund might include the death, disability, suspension, or disbarment of the lawyer. Like all fees, a general retainer must be reasonable under the circumstances.[9]

General retainers "are quite rare,"[10] and have "largely disappeared from the modern practice of law."[11] However, attempts to cast what is actually an advance payment of fees for services to be performed later as a general retainer are very much present today. Given the rarity and unusual nature of a general retainer, and the fact that very few clients would actually need or benefit from one, the nature of the fee and lawyer's obligations and client's benefits under such an agreement must be explained clearly and in detail, including the fact that fees for legal services performed will be charged in addition to the general retainer,[12] and use of the term should be restricted to its traditional definition.

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perform the legal services in the future." Gregory C. Sisk, *Duties to Effectively Represent the Client*, § 4-4.4(b) (A Retainer for Lawyer Availability), *in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West 2016).

[7] Lester Brickman, *The Advance Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account*, 10 CARDOZO L REV. 647, 649 n.13 (1989). *See also In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011).

[8] This opinion does not attempt to exhaustively discuss general retainers. Though they can and do have legitimate uses, for years they have been criticized, disfavored, and narrowly construed based on contract law, public policy, and contemporary ethics principles. *See, e.g.*, Charles J. McClain, Jr., *The Strange Concept of the Legal Retaining Fee*, 8 J. LEGAL PROF. 123 (1983) (common law of retainers "rests on rather shaky conceptual foundations" full of "inconsistencies and contradictions" and "contributing yet another irritant to the already strained relations between the legal profession and the public at large"); Pamela S. Kunen, *No Leg to Stand on: The General Retainer Exception to the Ban on Nonrefundable Retainers Must Fall*, 17 CARDOZO L. REV. 719 (1996) (discussing "historical and descriptive misconceptions" and arguing that, in many instances, such retainers generate the fiduciary obligations attending other lawyer-client fee agreements); and Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 449-453 (1998).

[9] MODEL RULES OF PROF'L CONDUCT R. 1.5(a); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 (2001) [hereinafter RESTATEMENT].

[10] Douglas R. Richmond*, Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 116 (2009). *See also In re* O'Farrell, 942 N.E.2d at 804 n.5.

[11] Provanzano v. Nat'l Auto Credit, Inc., 10 F. Supp. 2d 44, 51 (D. Mass. 1998).

[12] MODEL RULES OF PROF'L CONDUCT R. 1.5(b); RESTATEMENT, *supra* note 9, § 38.

This opinion focuses on advance fees paid by individual clients, usually for a single legal matter (or related matters) that will not recur on a regular basis. Examples include a divorce, defense of criminal charges, and discharge from employment or other civil matters not handled on a contingent fee basis. However, some clients may need legal services of a certain type on a repeat basis and may contract for such services. For example, the client and lawyer may enter into a renewable one-year agreement providing for a monthly payment to handle any or all collections arising out of one or more of the client's businesses. Some lawyers and clients may use the term "retainer" or "general retainer" to refer to such an arrangement. Such arrangements may be perfectly appropriate although they may not meet the definition of a general retainer even if "availability" is said to be a part of the arrangement. Perhaps the arrangement may best be understood as a fixed fee agreement, except that instead of handling one matter for a set fee no matter what services end up being required, the lawyer is handling several matters (subject to whatever limitations the parties place on the number, type, geography, etc., of the matters).[13]

B. Flat or Fixed Fees

Some lawyers prefer to charge their clients a flat or fixed fee for discrete legal services they provide. Examples include closing the purchase of a single-family home, incorporating a small business, drafting a will, or providing a defined, limited-scope service, such as drafting a motion. A flat fee is one that "embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted."[14]

If a flat or fixed fee is paid by the client in advance of the lawyer performing the legal work, the fees are an advance. Use of the term "flat fee" or "fixed fee" does not transform the arrangement into a fee that is "earned when paid." "Flat" or "fixed" does not even mean that the fee must be paid at the commencement of the representation, although most lawyers who do not have an existing relationship with a client may want to ensure payment and may, therefore, ask for the fee to be paid in advance before committing to the representation. If they do, as will be emphasized below, then that fee must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Several courts and ethics opinions endorse the option of dividing the representation into segments such that certain portions of a flat fee advance are considered earned before completion

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[13] As we have noted, courts scrutinize purported general retainers to ensure that the lawyer is not attempting to circumvent the ethics rules requiring refund of unearned fees upon termination of the representation. The same is true with what are sometimes called "hybrid" fees or retainers. Such a fee is "a putative general retainer that is denominated as both for availability and for services," and it is likely to be considered by courts to be "fully refundable to the extent not earned by services rendered." Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11, 22 (1995). *See also* N.Y. City Bar Formal Op. 2015-2 (Nonrefundable Monthly Fee in a Retainer Agreement) (2015), *citing* Agusta & Ross v. Trancamp Contracting Corp., 193 Misc.2d 781, 785-86 (N.Y. Civ. Ct. 2002) for the proposition that "enforcement of a hybrid retainer 'should be subject to close scrutiny, governed by a rebuttable presumption that any moneys retained by counsel are for services, rather than availability.'"

[14] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1389 (1977).

of all the contemplated work.[15] Some jurisdictions have codified this approach in their rules.[16] Thus, if agreed to, the lawyer may remove such earned portions of a flat fee advance from trust prior to the completion of the full scope of the legal services to be performed as certain "milestones" or stages of the representation are reached or completed. This approach allows the lawyer to be paid in part before the end of the representation and provides some assistance in determining the refund amount in case of early termination. Of course, "extreme 'front-loading' of payment milestones in the context of the anticipated length and complexity of the representation" may not be reasonable.[17]

C. So Called "Nonrefundable" and "Earned Upon Receipt" Fees

Some lawyers use labels like "nonrefundable retainer," "nonrefundable fee," or "earned on receipt" in the body or title of a fee agreement. These are not actual types of fees. And use of these descriptors does not, in and of itself, make a fee arrangement a general retainer. In fact, these terms are most often used in an attempt to make an advance fee nonrefundable.

The Model Rules of Professional Conduct do not allow a lawyer to sidestep the ethical obligation to safeguard client funds with an act of legerdemain: characterizing an advance as "nonrefundable" and/or "earned upon receipt." This approach does not withstand even superficial scrutiny. A lawyer may not charge an unreasonable fee. See Model Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."). Comment [4] to Rule 1.5 provides this additional guidance: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." See also, Model Rule 1.15(c) and others discussed in connection with Hypothetical 1 below. Therefore, under the Model Rules, an advance fee paid by a client to a lawyer for legal services to be provided in the future cannot be nonrefundable. Any unearned portion must be returned to the client. Labeling a fee paid in advance for work to be done in the future as "earned upon receipt" or "nonrefundable" does not make it so.[18]

Hypothetical scenarios illustrating these concepts and applying the Model Rules are discussed in Section IV below.

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[15] *See, e.g.*, New Hampshire Bar Assoc. Ethics Committee Practical Ethics Article, *Practical Suggestions for Flat Fees or Minimum Fees in Criminal Cases* (Jan. 17, 2008). *See also In re* Mance, 980 A.2d 1196, 1202, 1204-1205 (D.C. 2009), *citing* Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 FLA. COSTAL L.J. 293, 323 (1999) for the proposition that some opinions "allow the lawyer to withdraw fees according to milestones 'based upon passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and client.'"

[16] *See, e.g.*, Colo. Rules of Prof'l Conduct R. 1.5(h) (defining a flat fee, explaining proper handling, setting forth required contents of the agreement, and appending an authorized form agreement).

[17] *In re* Mance, *supra* note 15.

[18] *See, e.g.*, *In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011) ("Regardless of the term used to describe a client's initial payment, its type is determined by its purpose, i.e., what it is intended to purchase."); Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (labels not conclusive); *In re* Wintroub, 277 Neb. 787, 801; 765 N.W.2d 482 (2009) (citing cases from several jurisdictions for the proposition that "a lawyer may not retain an unearned fee, even if the fee agreement clearly provides that the fee is nonrefundable"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Turner, 918 N.W.2d 130, 147 (Iowa 2018) (simply labeling payment of advance fees as "nonrefundable" does not relieve attorney from obligation to deposit them into trust accounts).

II. Model Rule of Professional Conduct 1.15: The Anti-commingling Rule and the Need to Protect Client Funds, Including Advances

Rules of professional conduct exist for the protection of the public. That purpose is well served when the rules are designed and enforced to prevent concrete financial harm to clients. The anti-commingling principle, embodied in Rule 1.15, is a longstanding and effective component in the client protection arsenal. This is why, since their inception in 1908, the American Bar Association's model codes and rules of ethics have prohibited lawyers from commingling their property (including funds) with the property of clients and third parties.[19]

Under the general anti-commingling rule, Model Rule 1.15(a), client property, which includes unearned fees paid in advance, must be held in an account separate from the lawyer's own property.[20] In 2002, Model Rule 1.15 was amended to address specifically the issue of advance fees in a new paragraph (c): "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." Therefore, advances must be placed into a lawyer's trust account until those fees are earned.

The Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"), which recommended the addition of this paragraph, did so in response to reports "that the single largest class of claims made to client protection funds is for the taking of unearned fees."[21] Accordingly, paragraph (c) "provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses."[22] Stated simply, under the Model Rules advance fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Some jurisdictions have authorized lawyers to treat advances as the lawyer's property upon payment, so long as the client signs a fee agreement designating the sum as "nonrefundable" or

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[19] *See* ABA CANONS OF PROFESSIONAL ETHICS, Canon 11 (1908); ABA MODEL CODE OF PROF'L RESPONSIBILITY, DR 9-102 (1969); ABA MODEL RULES OF PROF'L CONDUCT R. 1.15 (1983, revised 2002). One treatise explains the nature and breadth of this key obligation:

> One of the core fiduciary duties of a lawyer is to safeguard the property that the lawyer receives from the client or from other sources but that belongs to the client or third persons. Property received from a client may include funds to be applied to a transaction, a payment in satisfaction of a judgment or settlement, an advance deposit against lawyer's fees, valuable documents to be analyzed, or property of evidentiary value. Under Rule 1.15(a) of the Model Rules of Professional Conduct, "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." The lawyer therefore must keep the property in a secure location and segregate those assets from the lawyer's own property. Gregory C. Sisk, Duties to Effectively Represent the Client, § 4-5.6 (The Duty to Safeguard Client Funds and Property), in Legal Ethics, Professional Responsibility, and the Legal Profession (West Academic Publishing, 2016).

[20] *In re* Kendall, 804 N.E.2d 1152, 1161 (Ind. 2004). Also, Rule 1.15(a)'s predecessor was applied to advance fees. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003) (failure to place advance fee in a trust account violated DR 9-102(A)).

[21] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 342 (ABA 2006).

[22] *Id.*

"earned on receipt" or some other variation on this theme.[23] This approach departs from the safekeeping policy of the Model Rules described herein and creates unnecessary risks for the client.[24]

III. Model Rule of Professional Conduct 1.16: Declining or Terminating Representation

Model Rule 1.16(d) requires that, upon termination of representation, a lawyer shall refund "any advance payment of fee or expense that has not been earned or incurred." This Rule, and Rule

[23] *See, e.g.*, Or. Rules of Prof'l Conduct R. 1.5(c)(3). That jurisdiction's version of Rule 1.15(c) contains an exception to the anti-commingling rule for advance fees when "the fee is denominated as 'earned on receipt,' 'nonrefundable' or similar terms and complies with Rule 1.5(c)(3)." Or. Rules of Prof'l Conduct R. 1.15-1(c). A considerable minority of U.S. jurisdictions have authorized this variant approach to advances by rule, ethics opinion, or judicial decree. *See, e.g.*, State Bar of Ariz. Op. 99-02 (1999) (non-refundable, earned-upon-receipt fee is ethical if reasonable under Rule 1.5 and client is fully informed about and expressly agrees to such a fee, preferably in writing; such a fee does not go into a lawyer's trust account); Fla. Rules of Prof'l Conduct R. 4-1.5(e)(2)(B) and Comment (nonrefundable flat fee is the property of the lawyer and should not be held in trust); Wash. State Rules of Prof'l Conduct R. 1.5(f)(2) (if agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt and shall not be deposited into a trust account); and N.Y. St. Bar. Assn. Comm. Prof'l Ethics Op. 816 (2007) (reaffirming 1985 opinion concluding that "fees paid to a lawyer in advance of services rendered are not necessarily client funds and need not be deposited in client trust account"). Such jurisdictions typically provide, via rule or otherwise, that advance fees must be refunded if unreasonable or work remains to be done even if language to the contrary is used and the funds have been taken by the lawyer pursuant to a rule and/or agreement.

[24] See *In re* Long, 368 Or. 452, 455–56, 474-75, 491 P.3d 783, 788–89, 798-99 (2021), cert. denied 142 S. Ct. 2685 (2022), in which the court candidly discussed the rule and its fallout:

> Respondent's limited financial resources also led to his extensive use of fee agreements that allowed him to access advance fees before completing the promised services. . . . The [Oregon] Rules of Professional Conduct allow for alternative fee agreements, under which advance fees become the lawyer's property at the time the fees are received—that is, before the lawyer has performed the promised services. RPC 1.5(c)(3). In those instances, the advance fees are not placed in the lawyer's trust account and are sometimes referred to as "earned on receipt." Fees may be "earned on receipt" only pursuant to a written fee agreement disclosing that "the funds will not be deposited into the lawyer trust account" and that "the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed." *Id.* [¶] According to respondent, because he frequently had pressing personal and business costs, he would not have been able to operate his legal practice if he could access a client's fees only after he completed the promised services. . . . [¶] Although respondent's handling of those advance fees did not itself violate a Rule of Professional Conduct, it nevertheless left respondent's clients vulnerable. "Earned on receipt" fee agreements shift the risk of loss to the client. If the client relationship ends before the lawyer has performed the services needed to keep the advance fees, then the lawyer is required to return the fees for the uncompleted work. If the lawyer has already spent the advance fees and has no other financial resources upon which to draw, then the lawyer may be unable to provide the client with the required refund. [¶] That is what happened to many of respondent's clients. . . . [¶] Respondent's misconduct caused extensive injuries, which were not merely financial. Many of respondent's clients had limited financial means and needed their advance fees returned before they could afford to hire new lawyers. When respondent failed to return those advance fees, some clients simply went without legal representation.

1.15, work in tandem to achieve the regulatory objective of protection of the public from financial harm caused by inattentive or unscrupulous lawyers.[25]

Advances are unearned because they are payment today for work to be performed in the future. They were unearned upon receipt and remain unearned until the work is performed. The Model Rules mandate that advances belong to the client, must be preserved until they are actually earned, and must be refunded if the representation terminates before the fees are earned.

As a practical matter it may be somewhat more difficult to determine what has been earned and what is unearned when a representation ends before completion of the contemplated services when the client pays a flat or fixed fee instead of an hourly rate. However, courts routinely apportion the services completed and sum earned when a representation terminates before a lawyer has completed all of the contemplated work.[26]

IV. Hypothetical Scenarios Involving Client Payments at the Commencement of a Specific Representation.

Hypothetical 1 ("Nonrefundable Retainer")

A lawyer is consulted by a client seeking to terminate her marriage. The lawyer informs the client that the lawyer requires a $6,000 "retainer" to cover the filing of a divorce complaint, preparing a motion to enjoin the transfer of assets and a possible motion for a protective order, attending hearings relative to those motions, and any negotiations or related work until the lawyer expends 20 hours. The client was also informed that additional "retainers" may be required to complete the matter, and that the retainers will be credited toward payment for the lawyer's services at the reasonable rate of $300 per hour. The lawyer's fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a nonrefundable retainer fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours on Client's matter, Client shall pay additional retainers as requested by Lawyer which shall be

[25] Nothing tarnishes the profession's reputation like a lawyer who takes an advance fee for legal services to be performed in the future, does not complete the work contemplated by the fee arrangement, and does not refund the money, perhaps because he or she cannot. Once the money has been spent by the lawyer, it may never be recovered by the client (or by the client protection fund which may have reimbursed the client). Even if a civil judgment or disciplinary order of restitution is entered it may do little good if the lawyer is impecunious, judgment-proof, or bankrupt. Discipline in that case may offer a measure of public protection through deterrence, but it does not recompense the client. That client's access to justice may also be impeded. The client may be unable to pay another advance fee and may, therefore, be unrepresented if legal aid or pro bono assistance is unavailable. Model Rules 1.15 and 1.16 exist to protect a client from these consequences.

[26] *See, e.g.*, *In re* O'Farrell, 942 N.E.2d 799, 808 (Ind. 2011) (quantum meruit available upon client termination of flat fee agreement). *Cf.* Plunkett & Cooney, PC v. Capitol Bancorp Ltd, 212 Mich. App. 325, 331; 536 N.W.2d 886 (1995) (discharged lawyer with fixed-fee agreement entitled to compensation for services rendered calculated by percentage of services required under contract, unless lawyer and client have agreed to other terms for valuing work completed).

applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

Three weeks after signing the agreement and paying the $6,000, Client notified Lawyer that she wanted to reconcile with her husband and asked for an itemization of Lawyer's time and expenses and a refund of any unearned fees. Lawyer had filed the complaint, but it had not been served. Lawyer had also prepared but had not filed a motion to enjoin the transfer of certain assets. Lawyer had spent 5.5 hours on the file and $150 to file the complaint, but responded to the Client that no refund was due because the $6,000 was a nonrefundable fee.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes, Lawyer owes Client a refund. First, the $6,000 paid by Client to the Lawyer are fees paid in advance not a general retainer. Under this agreement, Lawyer is rendering legal services at the rate of $300 per hour. This is true from the outset as is established by simply reading the portion of the agreement quoted above and performing some simple math. The $6,000 entitles Client to 20 hours of Lawyer's work on the matter.

Second, lawyer was required to have placed the $6,000 of advanced fees into the Lawyer's client trust account. Model Rule 1.15(c) provides that: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by Lawyer only as fees are earned or expenses incurred." The so-called nonrefundable fee here is an advance payment of fees that may only be withdrawn from the client trust account as earned by Lawyer. The facts of this hypothetical are silent as to whether Lawyer placed the $6,000 in the trust, operating, or personal account and as to whether it was spent in whole or in part. Lawyers may be disciplined for treating advance fees as their own property before the fees are earned, i.e., before the contemplated legal services are rendered.[27] Commingling and perhaps misappropriation may have occurred here if Lawyer deposited the $6,000 into an account other than a client trust account and spent it.

In this scenario, assuming that the legal work performed was appropriate and useful, Lawyer has earned $1,650.00 in legal fees. Lawyer also spent $150 for the expense of filing the complaint. Failure to return the balance of $4,200 is a violation of Model Rule 1.16(d) (upon termination of representation, a lawyer shall refund any advance payment of fee or expense that has not been earned or incurred). Comment [4] to Rule 1.16(d) explains the fundamental legal principle underlying this requirement: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Lawyer's failure to provide an accounting for the fees paid in advance also constitutes a violation of Rule 1.15(d).

[27] "A lawyer misappropriates client funds in violation of DR 1–102(A)(3), (4), (5), and (6)DR 1–102(A)(3), (4), (5), and (6) when special retainers and flat fees paid in advance are treated as money belonging to the lawyer and not maintained in a trust account until the fee has been earned." Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 475 (Iowa 2003). *See also In re* Fazande, 290 So. 3d 178, 185 (La. 2020) (lawyer violated Rule 1.15(c) by failing to deposit into his client trust account advance fees and costs).

Model Rule 1.5(a) provides: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Comment [4] to Rule 1.5 states: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." Thus, keeping the balance ($4,200) violates Rule 1.5(a) on these facts. Because Rule 1.5 precludes a lawyer from agreeing to an unreasonable fee, it is also violated by the Lawyer's inclusion of the following provision in the fee agreement: "Client agrees to pay Lawyer a nonrefundable fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason."[28]

Finally, because a lawyer may, in fact, be required to refund an advance payment of fees in various situations, characterizing such an advance as "nonrefundable" may also amount to a violation of Rule 1.4 (communication) and Rule 8.4(c) (misrepresentation) as the mischaracterization of the funds may have a chilling effect on a client seeking a refund of unearned fees upon termination of the representation.[29]

Lawyer and the fee agreement use the words "retainer" and "fee" interchangeably. In this hypothetical it appears that the word "retainer" is used incorrectly to refer to the advance payment of legal fees at the initiation of a matter, or, really, at any time during the representation as is suggested by the agreement's provision that additional "retainers" may be required.

Hypothetical 2 (Purported General Retainer)

The facts are the same as in Hypothetical 1, except that the lawyer's standard fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a non-refundable engagement fee of $6,000 which shall be deemed earned upon receipt by Lawyer. This engagement fee is for the purpose of retaining Lawyer and assuring the availability of Lawyer in this matter. Client understands that no portion of the engagement fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours, Client shall pay upon request an additional retainer in an amount determined by Lawyer which shall be applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

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[28] *In re* Kendall, 804 N.E.2d 1152, 1160 (Ind. 2004) ("We hold that the assertion in a lawyer fee agreement that such advance payment is nonrefundable violates the requirement of Prof. Cond. R. 1.5(a) that a lawyer's fee 'shall be reasonable.'"). *See also* N.Y. City Bar Ass'n Formal Opinion 1991-3 (in light of reasonableness requirement, duty to refund unearned fees, and client's "essentially absolute" right to discharge counsel, "a lawyer may not properly denominate or characterize a fee as 'nonrefundable' or otherwise use words that could reasonably be expected to convey to the client the understanding that a fee paid before the services are performed will not be subject to refund or adjustment under any possible circumstance").

[29] *See, e.g.*, *In re* Sather, 3 P.3d 403, 415 (Colo. 2000) (knowing use of misleading language, i.e., describing flat advance fee as "nonrefundable," violated Colo. RPC 8.4(c)) and Ala. State Bar Op. RO-93-21 (1993) ("Any indication by the lawyer that the fee is non-refundable is inaccurate and inherently misleading and would violate Rule 1.4(b) Communication; Rule 1.5(b) Fees; and Rule 8.4(c) Misrepresentation."). *See also* Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (in various situations "the description of the fee as 'nonrefundable' is misleading").

Again, the facts are the same: Lawyer spent 5.5 hours and a filing fee for the complaint, and Client reconciles and seeks a refund. Lawyer declines to refund any portion of the fee, claiming it is nonrefundable.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes. The answer and analysis for Hypothetical 1 apply here as well. The only difference ("retainer" and "engagement fee" language) makes no difference at all. The fee arrangement still has the same basic structure and, for the reasons discussed above, the $6,000 is clearly an advance payment for the future performance of legal services, not an actual "retainer" because the lawyer contemplates billing time against the advance.[30] Accordingly, the $6,000 must be held in trust until earned and any unearned portion properly refunded to the client.

Under the Model Rules, there are no magic words that a lawyer can use to change what is actually an advance payment for fees into a general retainer: "an attorney cannot treat a fee as 'earned' simply by labeling the fee 'earned on receipt' or referring to the fee as an 'engagement retainer.'"[31] Notwithstanding the use of the terms "engagement fee," "retainer," and "availability," the fee in Hypothetical 2 is still not a general retainer fee and is, therefore, not deemed earned on receipt. The purpose of the fee dictates its character and treatment irrespective of labels or terminology used.

Courts examine the transaction and agreement very carefully to ensure that the purported general retainer is not an attempt to charge and retain unearned advance fees.[32] Accordingly, a lawyer claiming to have a general retainer must be prepared to demonstrate a valuable benefit to the client and/or an actual detriment to the lawyer.[33] It is easy to recite that the lawyer is prioritizing the client's work, turning away other work, keeping up on the relevant law, etc. However, it must be shown that such things were not only actually done, but that they were necessary for the representation and not part of the lawyer's basic responsibilities.[34]

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[30] *Cf. In re* Lais, No. 91-O-08572, 1998 WL 391171, at *14-15 (Cal. Bar Ct. July 10, 1998) (characterization as "'fixed, non-refundable retaining fee' paid 'for the purpose of assuring the availability of [respondent] in this matter'" was "not determinative" and the fee was not a "true" (general) retainer, but actually payment for the first 10 hours of lawyer's services).

[31] *In re* Sather, 3 P.3d 403, 412 (Colo. 2000). *See also* note 18, *supra*.

[32] Richmond, *supra* note 10, at 116: "As a practical matter, general retainers are rare. . .. The types of representations that justify or require general retainers are also scarce. Courts hearing fee related controversies are therefore properly skeptical of general retainer claims." *See also* RESTATEMENT, *supra* note 9, § 34 ("Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and that the engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees.")

[33] Att'y Grievance Comm'n of Maryland v. Stinson, 428 Md. 147, 183-185, 50 A.3d 1222, 1244-1245 (2012) (purported engagement fee for "willingness and availability" to represent client not a true general retainer where no benefit to client or detriment to lawyer established and lawyer "produced no useable work").

[34] *See Stinson*, 50 A.3d at 1243 (benefits offered to the client in exchange for the nonrefundable fee were "nothing more than the ethical obligation imposed on all lawyers when they agree to provide legal services to a client. . . . A lawyer who agrees to perform legal services also necessarily agrees to be available to perform those services."), *citing* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited,* 72 N.C. L. REV. 1, 24 (1993), and Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003).

Hypothetical 3 (Flat Fee)

A client seeks to hire a lawyer for representation in a criminal matter. The fee agreement provides: "Client shall pay Lawyer the sum of $15,000 for representation in the matter of State v Client, and that no part of the flat fee shall be refunded for any reason. Client understands that the flat fee is the agreed upon amount due Lawyer regardless of the time expended on the matter or how it is resolved." Client signed the agreement and paid the full $15,000. Lawyer deposited the $15,000 into his firm's operating account. Lawyer reviewed the police report, left a message for the prosecutor and law enforcement officer, appeared on behalf of the defendant at the arraignment, and filed an appearance with the court. A few weeks after the arraignment, Client discharged Lawyer and requested an accounting and partial refund. Lawyer refused, stating that the flat fee was earned when it was paid.

As we noted above, flat fees paid in advance of performing the work are subject to Rule 1.15(c) and the other rules set forth in the analyses in Hypotheticals 1 and 2. In other words, the foregoing rules regarding safekeeping, refundability, and reasonableness apply.

Flat fees are not general retainers and must not be treated as such. That the price set for the representation is not based on hours worked but is instead based on the completion of certain described services does not mean that the fee must be considered earned on receipt or nonrefundable when there is work yet to be done. Of course, if the flat fee is paid *after* the work is completed, the funds are earned and are not deposited into the trust account.

V. Conclusion

The Model Rules protect a client's right to terminate the fiduciary relationship with a lawyer and have the money to which the client is entitled available to obtain successor counsel if desired. Rule 1.15 requires that fees paid in advance must be held in a trust account until the services for which the fees will be paid are actually rendered, thereby allocating various risks to lawyer and client. The lawyer does not have to bear the risk of nonpayment after the work is completed; Rule 1.15 provides a process for withdrawal of earned fees and even for disputes, should they arise. And the client does not have to bear the risk that the funds will be spent, attached by the lawyer's creditors, or otherwise dissipated before the legal work is performed due to a lawyer's unwillingness or inability to do so.

Other ethics opinions and resources discuss good billing practices and fee agreement drafting tips. However, we offer the following suggestions in relation to the matters addressed in this opinion. Use plain language. Thus, instead of "retainer" say "advance" and explain that it is a "deposit for fees."[35] Explain that the sum deposited will be applied to the balance owed for work on the matter, and how and when this will happen. For example, the fee agreement could provide

[35] GEOFFREY C. HAZARD, JR., PETER R. JARVIS, TRISHA THOMPSON & W. WILLIAM HODES, THE LAW OF LAWYERING §9.07 (4th ed. 2022-2 Supp. 2014). Of course, the applicable Rules of Professional Conduct must be consulted, and it may be prudent or required to use certain terms. However, accurately translating legal terms of art is not only helpful to the client but also assists with interpretation and enforcement. So, if the term "advance" or "special retainer" is used in the applicable rules, the lawyer will want to use it in the fee agreement. However, consider also adding an explanation that it is functionally a deposit to cover fees for work in the future.

that on a monthly basis the client will be invoiced for the time expended by the lawyer and state when the sum reflected in the invoice will be withdrawn from the trust account. When the arrangement is for hourly billing, explain that if the deposit exceeds the final billing any balance will be remitted to the client. If the advance fee is fixed and the representation may continue for some time or involve several stages, consider dividing the representation into reasonable segments and providing for withdrawal of a reasonable portion of the deposited fee as the representation progresses and the fee becomes partially earned.[36] Finally, it may be wise to recognize the reality that many relationships do not last and include a provision explaining what will happen if the representation is terminated before the matter is completed.[37]

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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[36] *See supra* notes 15 & 16.

[37] Again, see Colo. R. Prof'l Conduct R. 1.5(h) and accompanying flat fee form providing helpful language for dividing a representation into increments and explaining a method of calculating the fees the lawyer has earned should the representation terminate prior to completion of the tasks or events specified in the agreement.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: WILLIAM TYLER SIRIOS and BRIDGET MICHELLE SIRIOS, Debtors.	Case No. 20-16709 KHT Chapter 12
In re: SIRIOS LAND AND CATTLE, LLC, Debtor.	Case No. 20-16710 KHT Chapter 12

ORDER ON MOTION FOR ATTORNEYS' FEES AND COSTS

THIS MATTER came before the Court for evidentiary hearing on the *Motion for Attorneys' Fees and Costs Pursuant to Loan Document Reimbursement Clauses* (the "Motion," docket #202), filed by Bankwest of Kansas (the "Bank"), and the Objection thereto (docket #206), filed by the Debtors. The Court is fully advised in the premises and hereby finds and concludes as follows:

I. BACKGROUND

In 2019, Debtors Tyler and Bridget Sirios (the "Individuals") purchased real property of approximately 4,282 acres in Morgan and Weld Counties, Colorado (the "Farm"). The Individuals lived on the Farm, and their company, Sirios Land and Cattle (the "Company"), conducted farming operations on the Farm, using equipment owned by the Individuals.

That same year, the Individuals and the Company obtained financing from the Bank, including a $238,000 revolving line of credit for farm operations, a $457,439 loan to refinance farm machinery, a $2,746,864 loan to refinance the Farm, and a $350,000 revolving line of credit for cattle. All financing was cross collateralized by an agricultural security agreement (covering equipment, machinery, vehicles, crops and proceeds thereof, farm products, inventory and goods, fixtures, insurance proceeds, and government payments) and by a $5,600,000 deed of trust on the Farm.[1]

[1] The Bank had a 2018 appraisal stating the value of the Farm was $5,600,000. *See* Objection to Expedited Motion for Order Authorizing the Use of Cash Collateral, Docket No. 27, ¶17. The Individuals purchased

The Company operated profitably under a custom farming contract with Denver Metro Wastewater Reclamation District until approximately May 2020, when the Company lost that contract to lower bidder. The Company and the Individuals then fell behind on their payments to the Bank.

In late July 2020, the Bank retained the law firm of Spencer Fane, LLP (the "Law Firm") to pursue collection efforts against the Individuals and the Company. John A. O'Brien ("O'Brien"), a Law Firm partner with substantial experience in agricultural lending and collections, including bankruptcy cases, had primary responsibility for the Law Firm's representation of the Bank. Scott C. Sandberg ("Sandberg"), a Law Firm Partner with substantial litigation experience, also work on the Bank's behalf.

In August 2020, the Law Firm sent the Individuals and the Company a demand letter on behalf of the Bank. Shortly thereafter, the Law Firm pursued foreclosure proceedings against the Farm and replevin proceedings seeking appointment of a receiver to control the Individuals' and the Company's personal property. The Individuals and the Company asked real estate broker Robert Davig to help pursue an out-of-court workout with the Bank. Mr. Davig and the Law Firm engaged in extensive negotiations to reach a forbearance agreement, but an agreement could not be reached.

On October 9, 2020 (the "Petition Date"), the Individuals and the Company (together, the "Debtors") filed separate bankruptcy petitions under Chapter 12, which cases were later consolidated for administrative purposes. On the Petition Date, the Bank was owed the following amounts:

- On the $475,439 loan ("Claim #1"), the Bank was owed $423,726, of which $410,279 was principal and $13,446 was interest;[2]

- On the $350,000 revolving line of credit ("Claim #2"), the Bank was owed $119,677, of which $118,637 was principal and $1,040 was interest;[3]

- On the $238,000 revolving line of credit ("Claim #3"), the Bank was owed $237,334, of which $235,218 was principal and $2,116 was interest;[4] and

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the Farm for much less ($2.8 million) because the seller was a family friend, and Mr. Sirios' family had been farming in the area for generations. The Bank provided no other valuation during the pendency of this case.

[2] Amount based on the Amended Proof of Claim filed by the Bank on March 23, 2021. Debtors designated the claim as Claim #1 in their April 14 Plan.

[3] Amount based on the Amended Proof of Claim filed by the Bank on March 23, 2021. Debtors designated the claim as Claim #2 in their April 14 Plan.

[4] Amount based on the Amended Proof of Claim filed by the Bank on March 23, 2021. Debtors designated the claim as Claim #3 in their April 14 Plan.

- On the $2,746,864 loan ("Claim #4"), the Bank was owed $2,916,756, of which $2,746,864 was principal and $169,892 was interest.[5]

Altogether, the Bank was owed $3,697,493 on its claims (the "Bank Claims"). Debtors valued their Farm at $5,600,000 to $6,000,000 and their farm equipment at $1,000,000 to $1,012,000. Accordingly, the Bank was substantially oversecured.[6]

On the Petition Date, Debtors' only source of income was farm operations and proceeds from farm operations, including (1) a check Debtors had received prepetition, in the amount of $56,776.90 (the "Check"), made out to both Debtors and the Bank, representing proceeds from the sale of Debtors' wheat crop; and (2) a milo crop growing on 258 acres, which would be ready to harvest in November and ready to sell in December, with expected proceeds of $67,000. The Check and the milo crop proceeds were subject to the Bank's security interest and were therefore "cash collateral" of the Bank. The Bankruptcy Code provides Debtors may use cash collateral only if the Bank agrees or the Court authorizes its use.[7] Debtors were required to obtain Court authorization to use cash collateral for ordinary, reasonable expenses, for which the Bank refused to consent.

Debtors proceeded with their reorganization efforts, retaining Mr. Davig's firm, Leadbetter Webster Land Co., to sell the Farm in parcels (motion at docket #37, order at docket #41). The Bank objected to most of Debtors' motions to sell and refused to cooperate with payment of certain costs required for closing of the sales.

Debtors and the Bank engaged in litigation of other matters as discussed further below, including the Bank's objection to Debtors' claims of exemption; the Debtors' objection to the Bank's proof of claim, which improperly included post-petition interest in the pre-petition amounts owed; and the Bank's motion for relief from stay, which was not supported in law or in fact and was summarily denied. Finally, the Bank pursued several objections to confirmation of Debtors' Chapter 12 plan, which was a 100% plan providing for sale of the Farm and payment of proceeds to the Bank.

Debtors' Joint Amended Chapter 12 Plan of Reorganization Dated April 14, 2021 (the "April 14 Plan," docket #136), as corrected on May 21, 2021 (docket #191), was confirmed by Order entered May 24, 2021 (docket #196), and that date became the "Effective Date." As provided by ¶ 5.3 of the April 14 Plan, the Bank was to retain its liens and lien priority on all collateral until the Bank Claims were paid as follows:

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[5] Amount based on the Amended Proof of Claim filed by the Bank on March 23, 2021. Debtors designated the claim as Claim #4 in their April 14 Plan.

[6] At all relevant times, the Bank knew it was substantially oversecured. The Bank did not produce any evidence contradicting Debtors' value of the Farm or farm equipment.

[7] *See generally In re Westcamp*, 78 B.R. 834, 837 (Bankr. S.D. Ohio 1987) (discussing the standards for approval of use of cash collateral in Chapter 12 cases and the less stringent application of "adequate protection" under 11 U.S.C. § 1205).

1) Claim #1 will be paid the Contract Rate of Interest of 8.25% on the principal amount of $410,279. Claim #1 will be paid interest of 10.25% on the principal amount of $410,279 from the Petition Date to the Effective Date.

2) Claim #2 will be paid the Contract Rate of Interest of 8.00% on the principal amount of $118,637. Claim #2 will be paid interest of 10.00% on the principal amount of $118,637 from the Petition Date to the Effective Date.

3) Claim #3 will be paid the Contract Rate of Interest of 6.21% on the principal amount of $235,218. Claim #3 will be paid interest of 8.21% on the principal amount of $235,218 from the Petition Date to the Effective Date.

4) Claim #4 will be paid the Contract Rate of Interest of 6.5% on the principal amount of $2,746,864. Claim #4 will be paid interest of 8.5% on the principal amount of $2,746,864 from the Petition Date to the Effective Date.

April 14 Plan at 9. The April 14 Plan provided Debtors and the Bank had entered into a Stipulation Regarding Payoffs (the "Stipulation," attached to the April 14 Plan as Exhibit 1), which stated agreed payoffs of the four notes through May 24, 2021. And, the April 14 Plan further provides as follows:

> **Payment of Allowed Fees, Costs and Charges:** The Claim of [the Bank] is over-secured. Section 506(b) of the Code allows a secured creditor recovery of reasonable fees, costs, and charges under such circumstances. Debtors contest the right of [the Bank] to such recovery under the facts of this case. [The Bank] shall submit a Motion to the Court within forty five days after the Effective Date with an itemization of all fees, costs and charges requested. Debtors will then have twenty one days to file any objection to the fees, costs, and charges requested by [the Bank]. Debtors will pay the fees, costs, and charges allowed by the Court by the latter of fourteen days after entry of a final, nonappealable order allowing any such expenses or at the closing of the sale of the Farm as set forth below in Article VII.

Id. at 9-10. The Bank timely filed its Motion seeking fees of $157,073.50 and costs of $3,674.09 as well as the cost of the receiver in the amount of $3,660.02. Debtors timely filed their Objection.

Following the Court's resolution of a discovery dispute, which arose when the Bank refused to sign its discovery responses as required by the Federal Rules of Civil Procedure and applicable bankruptcy rules, the Court held a hearing at which the parties submitted evidence, including the testimony of fact and expert witnesses.

While the Court finds each expert witness to have been generally credible, the Court is sufficiently familiar with the case and the issues to reach its own findings and conclusions regarding the reasonableness of the fees sought by the Bank. *See In re MiniScribe Corp.*, 241 B.R. 729, 741 (Bankr. D. Colo. 1999) ("The Tenth Circuit Court of Appeals has signified its relative disdain for the type of opinions tendered by the various experts. In discussing the allowance of fees and the need for meaningful evidence, the Tenth Circuit has stated: 'While the district court will need evidence of local hourly rates, we agree with the court below that the practice of presenting experts to testify as to the total fee that should be awarded in a given case is not very helpful.' *Ramos v. Lamm,* 713 F.2d 546, 555 n. 6 (10th Cir.1983)."), *rev'd and remanded on other grounds, see* 309 F.3d 1234 (10th Cir. 2002).

II. APPLICABLE LAW

There is no dispute the notes comprising the Bank Claims contain provisions allowing the Bank to recover its reasonable costs incurred in collection of the notes, including attorneys' fees. The dispute is whether the costs and fees the Bank seeks are reasonable. It is well established "the holder of a note providing for the payment of reasonable attorneys' fees upon collection is entitled to the recovery of such a fee only upon a showing that the fee actually has been paid or incurred and that the amount of the fee is reasonable." *Stevens v. Liberty Loan Corp.*, 421 P.2d 732, 734 (Colo. 1966) (*en banc*);[8] *see also* 11 U.S.C. § 506(b) (requiring any fees, costs, or charges awarded to an oversecured creditor to be reasonable).

The Court must make "'an initial estimate of a reasonable attorney fee by calculating the lodestar amount,' which 'represents the number of hours reasonably expended on the case, multiplied by a reasonable hourly rate.'" *Arnold v. Arnold* (*In re Arnold)*, 2016 WL 1022350, *6 (10th Cir. BAP Mar. 15, 2016) (quoting *Payan v. Nash Finch Co.*, 310 P.3d 212, 217 (Colo. Ct. App. 2012)). Here, the Court has used the Law Firm's time entries as a starting point in making its calculation of the number of hours reasonably expended on the case.[9] "However, we note that it is not the court's burden 'to justify each dollar or hour deducted from the total submitted by counsel. It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero.'" *Payan v. Nash Finch Co*., 310 P.3d at 219 (quoting *Mares v. Credit Bureau*, 801 F.2d 1197, 1210 (10th Cir.1986)).

[8] The parties appear to agree the applicable law is that of Colorado. The Bank's Motion cites Colorado law.

[9] Toward this end, the Court required the Bank to provide the Court with a Microsoft Excel version of its Exhibit 12, setting forth the time entries for which recovery is sought. The Bank objected, arguing Debtors did not object to specific time entries of the Bank's counsel. The Court disagrees. Debtors and their expert did present specific objections to the Bank's fees, particularly those fees incurred in connection with the Bank's motion for relief from stay, objections to Debtors' exemptions, objections to Debtors' use of cash collateral, objections to Debtors' motion to sell parcels of land, and objections to confirmation of Debtors' Chapter 12 plan. But even if Debtors had not so objected, this Court is nevertheless tasked with determining the number of hours reasonably expended on the case, multiplied by a reasonable hourly rate, which requires the Court to review the time entries themselves.

Once the Court has determined a lodestar amount, it may adjust the amount based on factors outlined in Rule 1.5 of the Colorado Rules of Professional Conduct, including the following:

> (a) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (b) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (c) the fee customarily charged in the locality for similar legal services.

Home Loan Inv. v. St. Paul Mercury Ins., 78 F. Supp.3d 1307, 1315 (D. Colo. 2014).

III. LODESTAR DETERMINATION

The Court has separated the fees sought by the Bank into twelve categories and will discuss each in turn. But first, the Court will discuss a topic common across many of the categories: billing judgment and client oversight. Neither applicable loan documents nor applicable law provides "a blank check for over-secured creditors to incur any amount of legal fees and have them paid by the debtor." *In re Kurtenbach*, 2020 WL 7034405 (Bankr. N.D. Iowa 2020). Colorado law and § 506(b) require the Court to look at the efficiency of a creditor's fees with an eye towards fairly preserving the value of the bankruptcy estate. *See id.* The Court expects attorneys to exercise billing judgment when submitting their invoices for payment and expects clients to exercise oversight when reviewing invoices.

Here, the Court finds little evidence of billing judgment exercised by the Law Firm. The Law Firm used two partner-level attorneys to appear at hearings in which there was no real dispute, and neither attorney's time was discounted to avoid duplication. The Law Firm aggressively pursued matters that had a low likelihood of success and did not discount the fees incurred to reflect the ultimate lack of success and lack of benefit to either the bankruptcy estate or the Bank.

Further, the Court finds the Bank exercised no judgment when deciding whether to approve the Law Firm's work and payment of the Law Firm's fees. If the Bank had been solely responsible for payment of the Law Firm's fees, the Bank would have evaluated the Law Firm's work and invoices carefully. The Bank is not free to abandon that review when it is passing along the costs to its customers. In fact, the Bank may have more of a duty to review when the Bank seeks to pass along the costs to its customers, given the legal requirement of reasonableness. Here, the Bank's officer testified she conducted no review of the Law Firm's work or invoices because she knew the costs would be paid by the Debtors. The Court cannot condone the Bank's abdication of responsibility and could find a lack of reasonableness on that basis alone. But, the Court will proceed to consider the Law Firm's time spent and amounts charged for different matters, as discussed further below.

A. Initial Review and Demand Letter

The Bank seeks reimbursement for 12.8 hours of time the Law Firm spent on this matter, at a cost of $ 5,080.00. The Court has some concern with the total time spent, but the Court has even more concern with the time entries themselves, several of which are "lumped" or "blocked" together, *i.e.,* the tasks are not broken down by the time spent on each task. Lumping prevents this Court from determining the amount of time actually spent on each task and therefore prevents an appropriate review. As the Colorado Court of Appeals explained:

> [A] trial court retains discretion to reduce the hours billed based on block billing if the court is unable to determine whether the amount of time spent on various tasks was reasonable. *See Crow* [*v. Penrose-St. Francis Healthcare Sys.*, 262 P.3d 991, 1000 (Colo. Ct. App. 2011)]; *see also Hensley* [*v. Eckerhart*, 461 U.S. 424, 437 (1983)] (holding that fee applicant should "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims"); *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) ("We do not quarrel with the district court's authority to reduce hours that are billed in block format. The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked.").

Payan v. Nash Finch Co., 310 P.3d at 218.

The Law Firm's time spent in this category includes many "lumped" time entries, some exceeding an hour. The Court finds the July 29 Nissly time entry (0.6 hours not divided by task); the August 2 O'Brien time entry (5.5 hours not divided by task), the August 3 O'Brien time entry (1.3 hours not divided by task), and the August 3 Nissly time entry (2.6 hours not divided by task), are not sufficiently documented to allow this Court's review. The Court will exclude those entries from its determination of the amount reasonably expended on this matter, as set forth below:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
7/21/2020	Nissly, Anita L.	Email to client.	0.10	$200.00	$ 20.00
7/29/2020	Nissly, Anita L.	Review email from counsel to client; email to client regarding loan file; begin review of loan file.	0.60	$200.00	$ 120.00
	(reduction)	Remove time improperly lumped into one entry	(0.60)		($120.00)
7/31/2020	Nissly, Anita L.	Review loan file documents.	0.10	$200.00	$ 20.00
8/1/2020	O'Brien, John A.	Begin reviewing Credit Presentation.	0.40	$515.00	$ 206.00
8/2/2020	O'Brien, John A.	Continue reviewing loan file including Promissory Notes, Security Agreements, Financing Statements Proof of Trust, CCC-36, Assignments of Indemnity, Bank correspondence; Credit Presentation, UCC Searches, Financial Statements, Tax	5.50	$515.00	$ 2,832.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		returns, appraisals and collateral inspection reports, title work, Food Security Act Notices, Borrower Governance documents, officer notes to loan file; memo to Cara; begin drafting Demand Letter.			
	(reduction)	Remove time improperly lumped into one entry	(5.50)		($2,832.50)
8/3/2020	O'Brien, John A.	Memos from and to Cara; review additional information received from Cara; continue drafting Demand letters; address issues on Note marked paid and returned.	1.30	$515.00	$ 669.50
	(reduction)	Remove time improperly lumped into one entry	(1.30)		($669.50)
8/3/2020	Nissly, Anita L.	Telephone call from client; conduct UCC search; review of loan file documents; email to client regarding documents needed; email from client with documents; draft Notice of Default; email to client regarding Notice of Default.	2.60	$200.00	$ 520.00
	(reduction)	Remove time improperly lumped into one entry	(2.60)		($520.00)
8/4/2020	Nissly, Anita L.	Telephone call from client; email to client; review email from counsel to client; telephone calls from and to client regarding payoffs on demand letter.	0.50	$200.00	$ 100.00
8/5/2020	Nissly, Anita L.	Revisions to demand letter; email to client regarding revised demand letter; email from client; finalize demand letter; email to client regarding same; email from client.	0.90	$200.00	$ 180.00
8/5/2020	O'Brien, John A.	Review memo from and to Cara, Notice of Acceleration and additional documentation regarding first real estate note; finalize demand letter.	0.80	$515.00	$ 412.00
		Amount sought:	**12.80**		**$ 5,080.00**
		Amount not shown to be reasonable:	**(10.00)**		**($ 4,142.00)**
		Remaining amount:	**2.80**		**$ 938.00**

The Court finds the remaining amount, 2.8 hours of work, to have been reasonably expended on this matter. The Court finds each timekeeper's hourly rate to be reasonable. Accordingly, the Court finds the total of $938.00 to be a reasonable lodestar amount for this matter.

B. Research Regarding Deed of Trust

The Law Firm spent time researching the issue of the effectiveness of the Deed of Trust the Individuals signed as part of the Bank's refinancing. Considering applicable rules of professional conduct require attorneys to satisfy themselves of the factual and legal bases of recovery before proceeding with legal action, the Court finds it appropriate to award the time spent researching this matter, as set forth below:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
8/6/2020	O'Brien, John A.	Begin reviewing issues on validity of Bank's Deed of Trust secured by paid or reviewed Note.	0.80	$515.00	$ 412.00
8/7/2020	Nissly, Anita L.	Legal research regarding Note amount note matching Deed of Trust; draft letter to client	0.80	$200.00	$ 160.00
8/7/2020	O'Brien, John A.	Continue reviewing Renewed Note issue on real estate lien.	0.50	$515.00	$ 257.50
8/9/2020	O'Brien, John A.	Continue reviewing validity of deed of trust secured by refinanced Note.	1.10	$515.00	$ 566.50
8/10/2020	Nissly, Anita L.	Legal research regarding Note amount not matching Deed of Trust.	0.30	$200.00	$ 60.00
8/17/2020	O'Brien, John A.	Memo to Cara.	0.10	$515.00	$ 51.50
		Amount sought:	**3.60**		**$ 1,507.50**

The Court finds the amount sought, 3.6 hours of work, to have been reasonably expended on this matter. The Court finds each timekeeper's hourly rate to be reasonable. Accordingly, the Court finds the total of $1,507.50 to be a reasonable lodestar amount for this matter.

C. Foreclosure Proceedings

The Law Firm spent 30.5 hours pursuing a Public Trustee foreclosure of the Farm. The Court is not aware of any complication preventing the Law Firm from using standard forms for the foreclosure, and 30.5 hours strikes this Court as an excessive amount of time expended on initiation of a foreclosure (which was ultimately stayed by the Debtors' bankruptcy filing). Some of the time entries are "lumped" in a way that prevents this Court's review of their reasonableness, and the Court has therefore excluded those entries from its determination of the amount reasonably expended on this matter. The Court has excluded the Sandberg time entries because the Law Firm has not shown the matter required the services of two partner-level attorneys. Finally, the Court has excluded time the Law Firm spent correcting errors of either the Bank or the Law Firm, which time should not be charged to Debtors. The Court's determination of the amount reasonably expended on this matter is set forth below:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
8/19/2020	O'Brien, John A.	Memo to Stephens Feedyard; memo to Cara; telephone conversation with Cara, Dale,	3.20	$515.00	$1,648.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		and Tanner; begin foreclosure; review Feed Security Act Notice to HJ Stephens; telephone conversation with Matt Stephens; telephone conversation with Mr. Morrow.			
	(reduction)	Remove time improperly lumped into one entry:	(3.20)	$515.00	($1,648.00)
8/19/2020	Nissly, Anita L.	Draft letter to title company; review of loan documents; begin drafting foreclosure data sheet; begin work on complaint.	1.70	$200.00	$340.00
	(reduction)	Remove time improperly lumped into one entry.	(1.70)		($340.00)
8/20/2020	O'Brien, John A.	Telephone conversation with Cara (no charge); review memo from Stephens; memos to Cara; memo to Stephens.	0.40	$515.00	$206.00
	(reduction)	Remove time improperly lumped into one entry.	(0.40)		($206.00)
8/21/2020	O'Brien, John A.	Work on foreclosure documents.	0.30	$515.00	$154.50
8/24/2020	Nissly, Anita L.	Begin drafting Equipment and Machinery List; continue drafting foreclosure documents.	0.30	$200.00	$60.00
	(reduction)	Remove time improperly lumped into one entry.	(0.30)		($60.00)
8/26/2020	O'Brien, John A.	Review title commitment; memos from and to title company; memos to Cara.	0.40	$515.00	$206.00
	(reduction)	Remove time improperly lumped into one entry.	(0.40)		($206.00)
8/27/2020	Nissly, Anita L.	Work on legal description; emails to title company regarding status; emails to client regarding same; work on foreclosure documents.	1.20	$200.00	$240.00
	(reduction)	Remove time improperly lumped into one entry.	(1.20)		($240.00)
8/27/2020	O'Brien, John A.	Work on foreclosure.	0.20	$515.00	$103.00
8/28/2020	Nissly, Anita L.	Continue drafting foreclosure documents.	1.20	$200.00	$240.00
8/28/2020	O'Brien, John A.	Work on foreclosure pleadings.	0.40	$515.00	$206.00
8/29/2020	O'Brien, John A.	Review Governor's Executive Order staying foreclosure during COVID and applicability to Sirios loan; closer review of title commitment; memo to Cora; begin drafting letter to Public Trustee; reconcile legal description; review set off information; letter to Borrower regarding set off; letter regarding current cases	5.50	$515.00	$2,832.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		involving the return of orders referenced in Deed of Trust marked paid; begin drafting letter to Cara regarding same.			
	(reduction)	Remove time improperly lumped into one entry:	(5.50)	$515.00	($2,832.50)
8/31/2020	Nissly, Anita L.	Continue drafting foreclosure documents; review emails among counsel and client; emails to and from public trustee regarding minimum deposit requirement; continue drafting letter to public trustee; draft letter to client; draft set off letter to borrowers; emails to and from client regarding Certification of Qualified Holder; finalize set off letter to borrowers and mailing of same; email to client regarding same.	3.10	$200.00	$620.00
	(reduction)	Remove time improperly lumped into one entry	(3.10)		($620.00)
8/31/2020	O'Brien, John A.	Memos to and from Cara; finalize letter to Cara regarding original Note issues and foreclosure process; continue drafting letter to Public Trustee; finalize letter to Sirios; draft Certification; draft Notice of Election and demand for sale.	3.10	$515.00	$1,596.50
	(reduction)	Remove time improperly lumped into one entry.	(3.10)		($1,596.50)
9/1/2020	O'Brien, John A.	Memos from and to Cara (.2); review whether 30 day Notice of Foreclosure is needed on Sirios property (.5); finalize letter to Public Trustee and Notice of Election and demand for sale (.3); begin drafting Replevin Complaint (.2); telephone conversation with Mr. Morrow (.1).	1.30	$515.00	$669.50
	(time treated separately)	Remove replevin complaint work: begin drafting Replevin Complaint (.2); telephone conversation with Mr. Morrow (.1).	(0.30)	$515.00	($154.50)
9/1/2020	Nissly, Anita L.	Review emails among counsel and client (.1); review signed Certification from client and prepare for submission (.2); revisions to letter to public trustee (.2); continue drafting foreclosure documents (.4); finalize foreclosure documents	3.30	$200.00	$660.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		(.1); email to Public Trustee regarding same (.1); email to client regarding same (.1); emails from and to Public Trustee (.2); begin drafting Complaint (1.9).			
	(time treated separately)	Remove replevin complaint work (1.9)	(1.90)	$200.00	($380.00)
9/3/2020	O'Brien, John A.	Continue drafting Complaint (4.1); review email from Public Trustee (.1); memos to and from Cara (.1); telephone conversation with Public Trustee (.2); revise Public Trustee foreclosure documentation (.4).	4.90	$515.00	$2,523.50
	(time treated separately)	Remove replevin complaint work (4.1)	(4.10)	$515.00	($2,111.50)
9/4/2020	Nissly, Anita L.	Finalize letter to public trustee (.1); email to public trustee regarding some and foreclosure documents (.1); email to client and title company regarding same (.1); revisions to Complaint (.3); finalize draft Complaint (.1); email to client regarding same (.1); emails from and to public trustee (.2); continue compiling and labeling exhibits to complaint (.1); set up sharefile folder for exhibits (.1); email to client regarding exhibits (.1); telephone call from client (.2).	1.50	$200.00	$300.00
	(time treated separately)	Remove replevin work: revisions to Complaint (.3); finalize draft Complaint (.1); email to client regarding same (.1); continue compiling and labeling exhibits to complaint (.1); set up sharefile folder for exhibits (.1); email to client regarding exhibits (.1); telephone call from client (.2).	(1.00)	$200.00	($200.00)
9/4/2020	O'Brien, John A.	Continue drafting Complaint (2.3); draft Oath of Receiver (.2); finalize foreclosure documentation to Public Trustee (.3); telephone conference with Cara, Tanner and Dale (.3).	3.10	$515.00	$1,596.50
	(time treated separately)	Remove replevin work: Continue drafting Complaint (2.3); draft Oath of Receiver (.2);	(2.50)	$515.00	($1,287.50)
9/9/2020	O'Brien, John A.	Memos from and to Cara (.1); work on Complaint (2.2); memo to Mr. Davig (.1); review email	4.90	$515.00	$2,523.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		from Public Trustee (.1); review recorded notice of election and demand for sale (.1); draft Civil Cover Sheet, Order to Show Cause, Temporary Order to Preserve and Order for Appointment of Receiver (2.2); review memo from Mr. Davig (.1).			
	(time treated separately)	Remove replevin work: work on Complaint (2.2); draft Civil Cover Sheet, Order to Show Cause, Temporary Order to Preserve and Order for Appointment of Receiver (2.2)	(4.40)	$515.00	($2,266.00)
	(time treated separately)	Remove negotiation work: memo to Mr. Davig (.1); review memo from Mr. Davig (.1).	(0.20)	$515.00	($103.00)
9/14/2020	Nissly, Anita L.	Review emails from public trustee (.1); docket foreclosure deadlines (.2); letter to title company (.2); email to title company (.1); download recorded NED (.1); email to client regarding same (.1); telephone call to clerk of court regarding entry of notice by the court for service on defendants (.1); draft summonses (.2); compile documents to be served (.1); emails to process servers (.2); email from process server (.1); finalize summonses for service (.1); emails from client regarding loan payment history (.1); emails from and to publication regarding proof (.2); email to client regarding same (.1); email to public trustee and publication requesting addition to distribution list (.1); email to client regarding same; updates to dist list (.1); email to process server regarding documents to be served (.2).	2.40	$200.00	$480.00
9/14/2020	O'Brien, John A.	Memos from and to Mr. Davig (.3); telephone conversation with Cara, Tanner, Dale, and loan committee (.5); attention to serving Defendants (.1); draft Summons (.1); review Notice of Court Proceeding by Webex (.2); draft Term Sheet for work-out terms (2.0); telephone conversation with Mr. Davig (.2);	3.50	$515.00	$1,802.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		review memos from Public Trustee (.1).			
	(time treated separately)	Remove replevin work: attention to serving Defendants (.1); draft Summons (.1); review Notice of Court Proceeding by Webex (.2)	(0.40)	$515.00	($206.00)
	(time treated separately)	Remove negotiations: Memos from and to Mr. Davig (.3); telephone conversation with Cara, Tanner, Dale, and loan committee (.5); draft Term Sheet for work-out terms (2.0); telephone conversation with Mr. Davig (.2)	(3.00)	$515.00	($1,545.00)
9/14/2020	Sandberg, Scott C.	Review court filings (.4).	0.40	$440.00	$176.00
	(reduction)	Remove work duplicating that of other counsel	(0.40)	$440.00	($176.00)
9/15/2020	Nissly, Anita L.	Email from process server (.1); review emails from publication and public trustee (.1); emails to client (.1); proofread the proof of combined notice (.1); email to publication and public trustee regarding errors in the proof (.1); email to client regarding same (.1).	0.60	$200.00	$120.00
	(reduction)	Remove work correcting errors of either the bank or the law firm, which should not be charged to Debtors: email to publication and public trustee regarding errors in the proof (.1); email to client regarding same (.1)	(0.20)	$200.00	($40.00)
9/16/2020	Nissly, Anita L.	Email from title company (.1); review title work (.1); email to client regarding title work (.1); proofread combined notice proof (.1); email to publication and public trustee regarding errors (.1); email to client regarding same (1).	0.60	$200.00	$120.00
	(reduction)	Remove work correcting errors: email to publication and public trustee regarding errors (.1); email to client regarding same (1).	(0.20)	$200.00	($40.00)
9/17/2020	O'Brien, John A.	Memos from and to Cara (.1); closer review of Listing Agreement (.3); telephone conversation with Cara, Dale, and Tanner (.2); telephone conversation with Mr. Davig (.2); memo to Cara regarding Davig	2.40	$515.00	$1,236.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		call (.2); begin drafting Workout Agreement (1.3); review memos from Public Trustee regarding legal descriptions and publications (.1).			
	(time treated separately)	Remove negotiations work: Memos from and to Cara (.1); closer review of Listing Agreement (.3); telephone conversation with Cara, Dale, and Tanner (.2); telephone conversation with Mr. Davig (.2); memo to Cara regarding Davig call (.2); begin drafting Workout Agreement (1.3)	(2.30)	$515.00	($1,184.50)
9/17/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1); begin drafting Agreement (.4); email from publication (.1); proofread proof (.2); email to publication (.1); email to client regarding same (.1); continue docketing foreclosure deadlines (.1).	1.10	$200.00	$220.00
	(time treated separately)	Remove negotiation work: begin drafting Agreement (.4)	(0.40)	$200.00	($80.00)
		All time entries above:	**51.00**		**$20,880.00**
		Time treated separately (in other categories):	**(20.50)**		**($9,518.00)**
		Amount sought in this category:	**30.50**		**$11,362.00**
		Amount not shown to be reasonable:	**(19.70)**		**($8,005.00)**
		Remaining amount:	**10.80**		**$3,357.00**

The Court finds the remaining amount, 10.80 hours of work, to have been reasonably expended on this matter. The Court finds each timekeeper's hourly rate to be reasonable. Accordingly, the Court finds the total of $3,357.00 to be a reasonable lodestar amount for this matter.

D. Replevin/Receivership Proceedings

The Law Firm spent 43.4 hours, at a cost of $17,311.00, pursuing a replevin complaint and seeking appointment of a receiver for the Individuals' and the Company's personal property. The Court cannot find this to be a reasonable amount, for several reasons. First, the Law Firm spent a substantial amount of time (13.10 hours by O'Brien and 6.8 hours spent by Nissly) drafting what should have been a relatively simple complaint. The time spent serving the complaint appears to be excessive, and the time spent responding to the court's order to show cause and correcting errors in service should not be charged to the Debtors. Finally, the overall time and expense incurred pursuing receivership did not result in any benefit to the Bank. The receiver never actually took possession of Debtors' property, and the Bank was already pursuing foreclosure of

the Farm, which was worth more than the Bank was owed. The Court's determination of the amount reasonably expended on this matter is set forth below:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
9/1/2020	O'Brien, John A. (time treated separately)	Memos from and to Cara (.2); review whether 30-day Notice of Foreclosure is needed on Sirios property (.5); finalize letter to Public Trustee and Notice of Election and demand for sale (.3); begin drafting Replevin Complaint (.2); telephone conversation with Mr. Morrow (.1).			
		replevin complaint work: begin drafting Replevin Complaint (.2); telephone conversation with Mr. Morrow (.1).	0.30	$515.00	$154.50
9/1/2020	Nissly, Anita L. (time treated separately)	Review emails among counsel and client (.1); review signed Certification from client and prepare for submission (.2); revisions to letter to public trustee (.2); continue drafting foreclosure documents (.4); finalize foreclosure documents (.1); email to Public Trustee regarding same (.1); email to client regarding same (.1); emails from and to Public Trustee (.2); begin drafting Complaint (1.9).			
		replevin complaint work (1.9)	1.90	$200.00	$380.00
9/2/2020	Nissly, Anita L.	Continue drafting Complaint (2.1); begin drafting civil cover sheet, Order Appointing Receiver, Temporary Order to Preserve Property, Order to Show Cause and Order for Possession (1.2).	3.30	$200.00	$660.00
9/3/2020	O'Brien, John A. (time treated separately)	Continue drafting Complaint (4.1); review email from Public Trustee (.1); memos to and from Cara (.1); telephone conversation with Public Trustee (.2); revise Public Trustee foreclosure documentation (.4).			
		replevin complaint work (4.1)	4.10	$515.00	$2,111.50
9/3/2020	Nissly, Anita L.	Continue drafting Complaint (1.2); continue drafting Oath of Receiver (.2); finalize Oath of Receiver (.1); emails to and from receiver regarding same (.2); email from Public Trustee rejecting foreclosure documents	2.30	$200.00	$460.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		(.1); revisions to foreclosure documents (.5).			
9/4/2020	Nissly, Anita L. (time treated separately)	Finalize letter to public trustee (.1); email to public trustee regarding some and foreclosure documents (.1); email to client and title company regarding same (.1); revisions to Complaint (.3); finalize draft Complaint (.1); email to client regarding same (.1); emails from and to public trustee (.2); continue compiling and labeling exhibits to complaint (.1); set up sharefile folder for exhibits (.1); email to client regarding exhibits (.1); telephone call from client (.2).			
		replevin work: revisions to Complaint (.3); finalize draft Complaint (.1); email to client regarding same (.1); continue compiling and labeling exhibits to complaint (.1); set up sharefile folder for exhibits (.1); email to client regarding exhibits (.1); telephone call from client (.2).	1.00	$200.00	$200.00
9/4/2020	O'Brien, John A. (time treated separately)	Continue drafting Complaint (2.3); draft Oath of Receiver (.2); finalize foreclosure documentation to Public Trustee (.3); telephone conference with Cara, Tanner and Dale (.3).			
		replevin work: Continue drafting Complaint (2.3); draft Oath of Receiver (.2);	2.50	$515.00	$1,287.50
9/9/2020	O'Brien, John A. (time treated separately)	Memos from and to Cara (.1); work on Complaint (2.2); memo to Mr. Davig (.1); review email from Public Trustee (.1); review recorded notice of election and demand for sale (.1); draft Civil Cover Sheet, Order to Show Cause, Temporary Order to Preserve and Order for Appointment of Receiver (2.2); review memo from Mr. Davig (.1).			
		replevin work: work on Complaint (2.2); draft Civil Cover Sheet, Order to Show Cause, Temporary Order to	4.40	$515.00	$2,266.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Preserve and Order for Appointment of Receiver (2.2)			
9/10/2020	O'Brien, John A.	Memos from and to Cara (.4); finalize Complaint (.6); finalize Proposed Temporary order to preserve property, Order to Show Cause and Order for Appointment of Receiver (.9).	1.90	$515.00	$978.50
9/11/2020	O'Brien, John A.	Telephone conversation with Clerk of Court (.1); draft waiver of 14-day requirement of Rule 104 (.4); memo to Cara (.1).	0.60	$515.00	$309.00
9/12/2020	O'Brien, John A.	Review Order to Show Cause (.1); attention to serving order (.1); review initial case management order (.1).	0.30	$515.00	$154.50
9/13/2020	O'Brien, John A.	Telephone conversation with Mr. Morrow (.1).	0.10	$515.00	$51.50
9/14/2020	O'Brien, John A. (time treated separately)	Memos from and to Mr. Davig (.3); telephone conversation with Cara, Tanner, Dale, and loan committee (.5); attention to serving Defendants (.1); draft Summons (.1); review Notice of Court Proceeding by Webex (.2); draft Term Sheet for work-out terms (2.0); telephone conversation with Mr. Davig (.2); review memos from Public Trustee (.1).			
		replevin work: attention to serving Defendants (.1); draft Summons (.1); review Notice of Court Proceeding by Webex (.2)	0.40	$515.00	$206.00
9/18/2020	Nissly, Anita L.	Continue drafting Agreement (.2); email from process server regarding status of service (.1); email to client regarding same (.1).	0.40	$200.00	$80.00
	(time treated separately)	remove negotiation work: Continue drafting Agreement (.2)	(0.20)	$200.00	($40.00)
9/21/2020	Nissly, Anita L.	Continue drafting Agreement (1.5); draft Deed of Trust (.4); emails to and from process server regarding status of service of complaint (.2); email to client regarding status of service (.1); emails to and from client regarding payoffs (.1); finalize Agreement (.2); compile and label exhibits to Agreement (.6); set up sharefile folder for transmitting exhibits to client	3.60	$200.00	$720.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		(.2); email to client regarding Agreement and Exhibits (.1).			
	(reduction)	remove .2 not reflected in allocation	(0.20)	$200.00	($40.00)
	(time treated separately)	remove negotiation work: Continue drafting Agreement (1.5); draft Deed of Trust (.4); emails to and from client regarding payoffs (.1); finalize Agreement (.2); compile and label exhibits to Agreement (.6); set up sharefile folder for transmitting exhibits to client (.2); email to client regarding Agreement and Exhibits (.1).	(3.10)	$200.00	($620.00)
9/22/2020	Nissly, Anita L.	Review Affidavits of Service from process server (.1); review emails among counsel and client (.1); finalize Affidavits for filing with the court (.1); emails to and from process server regarding amending Affidavit of Service (.2).	0.50	$200.00	$100.00
9/23/2020	Nissly, Anita L.	Email from process server regarding Amended Affidavit of Service (.1); email from client (.1).	0.20	$200.00	$40.00
9/24/2020	Nissly, Anita L.	Revisions to Severance Agreement (.4); begin drafting direct exam (2.0); work on hearing exhibits and notebooks (.1).	2.50	$200.00	$500.00
9/24/2020	Nissly, Anita L.	Work on hearing exhibit notebooks (.2); finalize Amended Affidavit of Service for filing with the court (.1).	0.30	$200.00	$60.00
9/25/2020	Nissly, Anita L.	Work on hearing exhibit notebooks (.3); revisions to Agreement (.2); email to client regarding same (.1); email to B. Davig regarding Agreement (.1); email to client regarding same (.1); finalize hearing note books (.2); letter and email to client regarding same (.2); review email from counsel to client (.1); emails to and from Clerk of Court regarding instructions for exhibits during webex hearing (.1); work on additional hearing exhibit notebooks for opposing parties (.1).	1.50	$200.00	$300.00
	(time treated separately)	remove negotiation work: revisions to Agreement (.2);	(0.50)	$200.00	($100.00)

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		email to client regarding same (.1); email to B. Davig regarding Agreement (.1); email to client regarding same (.1);			
9/26/2020	O'Brien, John A.	Work on Cara's direct examination (.8).	0.80	$515.00	$412.00
9/28/2020	Nissly, Anita L.	Continue drafting direct exam (.4); finalize direct exam (.1); email to client regarding direct exam (.1).	0.60	$200.00	$120.00
9/28/2020	O'Brien, John A.	Telephone conversation with Cara (no charge); continue drafting Cara's direct examination (.8); memo to Cara (.1).	0.90	$515.00	$463.50
9/29/2020	Nissly, Anita L.	Assist attorney in preparing for hearing including set up of Webex (.3).	0.30	$200.00	$60.00
9/29/2020	O'Brien, John A.	Telephone conversation with Cara (no charge); telephone conversation with Mr. Morrow (.1).	0.10	$515.00	$51.50
9/30/2020	Nissly, Anita L.	Telephone call to Division Clerk (.2).	0.20	$200.00	$40.00
9/30/2020	O'Brien, John A.	Review memo from Sirios counsel (.2); memos to Cara (.1); memo to Sirios counsel (.1); telephone conversation with Cara and Dale (no charge); prepare for replevin hearing (.5).	0.90	$515.00	$463.50
10/1/2020	Nissly, Anita L.	Review email from counsel to client (.1); draft Stipulated Order For Possession (.2); draft Stipulated Order Appointing Receiver (.2); finalize orders (.2).	0.70	$200.00	$140.00
10/1/2020	O'Brien, John A.	Prepare for hearing (.2); telephone conversation with Cara and Dale (.2); memos from and to Borrower's counsel (.1); draft Order for Possession (.4); draft Stipulated Order for Possession (1.0); draft Stipulated Order for Appointment of Receiver (1.0); telephone conversation with Mr. Morrow (.1); telephone conversation with Mr. Morrow (.1).	2.90	$515.00	$1,493.50
10/2/2020	O'Brien, John A.	Several telephone conversation with Cara (no charge); telephone conversation with Mr. Morrow (.2); memos from and to Borrower's counsel (.2); work	6.40	$515.00	$3,296.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		on proposed orders (.8); prepare for Replevin hearing including opening statement, Cara's Direct Examination, Morrow Direct Examination, Sirios Cross Examination and closing arguments (4.1); review Returns of Service (.1); review Court Docket Sheet (.1); attend Replevin Hearing (.4); telephone conversation with Mr. Morrow, Mr. Brown, and Cara (.5).			
10/2/2020	Nissly, Anita L.	Finalize proposed order for possession for filing with court (.1); review emails among counsels; finalize stipulated orders for filing with the court (.1); email to G. Humphries regarding fully executed stipulated orders as filed with the court (.1); email to client regarding same (.1).	0.40	$200.00	$80.00
10/3/2020	O'Brien, John A.	Review Final Order Appointing Receiver (.1); review Final Order for Possession (.1).	0.20	$515.00	$103.00
10/6/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$200.00	$20.00
10/6/2020	O'Brien, John A.	Telephone conversation with Mr. Morrow (.1); review Humphrey's Entry of Appearance (.1); telephone conversation with Mr. Brown (.1); review memo from Mr. Brown and inspection pictures (.1); memo to Cara (.1).	0.40	$515.00	$206.00
10/8/2020	O'Brien, John A.	Closer review of information from Mr. Brown on equipment location and condition (.2).	0.20	$515.00	$103.00
		All time entries above:	**47.20**		**$18,071.00**
		Time treated separately (in other categories):	**(3.80)**		**($760.00)**
		Amount sought in this category:	**43.40**		**$17,311.00**
		Time not properly allocated:	**(0.20)**		**($40.00)**
		Subtotal:	**43.20**		**$17,271.00**
		50% reduction:	**(21.60)**		**($8,635.50)**
		Remaining amount:	**21.60**		**$8,635.50**

The Court finds the time sought to be excessive and a 50% reduction to be appropriate, with the remaining amount, 21.6 hours, reasonably expended pursing this matter. The Court finds each timekeeper's hourly rate to be reasonable. Accordingly, the Court finds the total of $8,635.50 to be a reasonable lodestar amount for this matter.

The Bank also requests reimbursement of $3,660.02 for the Receiver's expenses, which includes three separate trips to the Farm to inventory Debtors' equipment. The Court finds the first trip, made by Jim Brown on September 28, 2020, to be reasonable, because the receivership action had just been filed, and an inventory was appropriate. The second trip, made by Tom Morrow, Jim Brown, and Bruce Segelke on October 6, 2020, seems somewhat duplicative of the work done the week before. But, at that time, the receivership action was still pending, and some continued investigation may have been necessary and appropriate. The Court cannot find the third trip, made by Jim Brown on February 3, 2021, to have been necessary or appropriate. By that time, the Debtors' bankruptcy case was well underway, and the receivership action had been stayed. The cost of the third trip, $625 in time and $95.45 in mileage, should not be charged to the Debtors. The remaining cost, $2,939.57, is reasonably charged to Debtors.

E. Pre-petition Negotiations

The Law Firm spent a substantial amount of time participating in negotiations with Debtors' representative, Mr. Davig, and preparing a forbearance agreement. The Court's determination of the amount reasonably expended on this matter is set forth below:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
9/8/2020	O'Brien, John A.	Telephone conference with Cara (no charge); lengthy telephone conference with Mr. Davig (1.3); memos to Cara (.2); review memos from Mr. Davig (.3); review memo from Mr. Sirios (.1).	1.90	$515.00	$978.50
9/9/2020	O'Brien, John A. (time treated separately)	Memos from and to Cara (.1); work on Complaint (2.2); memo to Mr. Davig (.1); review email from Public Trustee (.1); review recorded notice of election and demand for sale (.1); draft Civil Cover Sheet, Order to Show Cause, Temporary Order to Preserve and Order for Appointment of Receiver (2.2); review memo from Mr. Davig (.1).			
		negotiation work: memo to Mr. Davig (.1); review memo from Mr. Davig (.1).	0.20	$515.00	$103.00
9/14/2020	O'Brien, John A. (time treated separately)	Memos from and to Mr. Davig (.3); telephone conversation with Cara, Tanner, Dale, and loan committee (.5); attention to serving Defendants (.1); draft Summons (.1); review Notice of Court Proceeding by Webex (.2); draft Term Sheet for work-out terms (2.0); telephone conversation with			

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Mr. Davig (.2); review memos from Public Trustee (.1).			
		negotiation work: Memos from and to Mr. Davig (.3); telephone conversation with Cara, Tanner, Dale, and loan committee (.5); draft Term Sheet for work-out terms (2.0); telephone conversation with Mr. Davig (.2)	3.00	$515.00	$1,545.00
9/15/2020	O'Brien, John A.	Review memo from Cara (.2); closer review of payment history and cattle settlement (.5); memo to Mr. Davig (.2).	0.90	$515.00	$463.50
9/16/2020	O'Brien, John A.	Review memo from Davig (.1); review listing agreement (.7); memos to and from Cara (.1); review updated title work (.2); telephone conversation with Mr. Davig (.2).	1.30	$515.00	$669.50
9/17/2020	O'Brien, John A. (time treated separately)	Memos from and to Cara (.1); closer review of Listing Agreement (.3); telephone conversation with Cara, Dale, and Tanner (.2); telephone conversation with Mr. Davig (.2); memo to Cara regarding Davig call (.2); begin drafting Workout Agreement (1.3); review memos from Public Trustee regarding legal descriptions and publications (.1).			
		negotiation work: Memos from and to Cara (.1); closer review of Listing Agreement (.3); telephone conversation with Cara, Dale, and Tanner (.2); telephone conversation with Mr. Davig (.2); memo to Cara regarding Davig call (.2); begin drafting Workout Agreement (1.3)	2.30	$515.00	$1,184.50
9/17/2020	Nissly, Anita L. (time treated separately)	Review court filings and docket deadlines accordingly (.1); begin drafting Agreement (.4); email from publication (.1); proofread proof (.2); email to publication (.1); email to client regarding same (.1); continue docketing foreclosure deadlines (.1).			
		negotiation work: begin drafting Agreement (.4)	0.40	$200.00	$80.00
9/18/2020	O'Brien, John A.	Memos from and to Mr. Davig	0.50	$515.00	$257.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		(.3); memos to and from Cara (.2)			
9/18/2020	Nissly, Anita L. (time treated separately)	Continue drafting Agreement (.2); email from process server regarding status of service (.1); email to client regarding same (.1).			
		negotiation work: Continue drafting Agreement (.2)	0.20	$200.00	$40.00
9/19/2020	O'Brien, John A.	Closer review of new listing Agreement (.3); closer review of memos from Mr. Davig (.4); work on Forbearance Agreement (1.2); memo to Mr. Davig (.1); memo to Cara (.1).	2.10	$515.00	$1,081.50
9/20/2020	O'Brien, John A.	Review memo from Mr. Davig (.1); memo to Cara (.1).	0.20	$515.00	$103.00
9/21/2020	Nissly, Anita L. (time treated separately)	Continue drafting Agreement (1.5); draft Deed of Trust (.4); emails to and from process server regarding status of service of complaint (.2); email to client regarding status of service (.1); emails to and from client regarding payoffs (.1); finalize Agreement (.2); compile and label exhibits to Agreement (.6); set up sharefile folder for transmitting exhibits to client (.2); email to client regarding Agreement and Exhibits (.1).			
		Negotiation work: Continue drafting Agreement (1.5); draft Deed of Trust (.4); emails to and from client regarding payoffs (.1); finalize Agreement (.2); compile and label exhibits to Agreement (.6); set up sharefile folder for transmitting exhibits to client (.2); email to client regarding Agreement and Exhibits (.1).	3.10	$200.00	$620.00
9/21/2020	O'Brien, John A.	Memos to and from Mr. Davig (.2); memos to Cara (.2); review Addendum to Listing Agreement (.2); continue drafting possible workout agreement (3.9); draft Deed of Trust to secure all Notes (.9).	5.40	$515.00	$2,781.00
9/22/2020	O'Brien, John A.	Memos from and to Cara (.1); memos to and from Mr. Davig (.2).	0.30	$515.00	$154.50
9/23/2020	O'Brien, John A.	Telephone conversation with Cara, Dale and Tanner (.3);	2.40	$515.00	$1,236.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		several memos from and to Mr. Davig (.4); work on Forbearance Agreement (1.7).			
9/24/2020	O'Brien, John A.	Continue drafting Forbearance Agreement incorporating Bank comments (2.2); memos from and to Cara (.2); telephone conversation with Mr. Davig (.2); telephone conversation with Cara (.1).	2.70	$515.00	$1,390.50
9/25/2020	Nissly, Anita L. (time treated separately)	Work on hearing exhibit notebooks (.3); revisions to Agreement (.2); email to client regarding same (.1); email to B. Davig regarding Agreement (.1); email to client regarding same (.1); finalize hearing note books (.2); letter and email to client regarding same (.2); review email from counsel to client (.1); emails to and from Clerk of Court regarding instructions for exhibits during webex hearing (.1); work on additional hearing exhibit notebooks for opposing parties (.1).			
		negotiation work: revisions to Agreement (.2); email to client regarding same (.1); email to B. Davig regarding Agreement (.1); email to client regarding same (.1);	0.50	$200.00	$100.00
9/25/2020	O'Brien, John A.	Telephone conversation with Cara (.1); memos to and from Mr. Davig (.2); revise Forbearance Agreement (.7).	1.00	$515.00	$515.00
		Total:	**28.40**		**$13,303.00**

Although the time spent in this category is high, 28.40 hours, the Court encourages parties to pursue out-of-court settlements, which generally benefit all parties in interest. The Court therefore finds the amount sought, 28.40 hours, to have been reasonably expended on this matter. The Court finds each timekeeper's hourly rate to be reasonable. Accordingly, the Court finds the total of $13,303.00 to be a reasonable lodestar amount for this matter.

F. General Bankruptcy

The Court has included in this category general bankruptcy-related matters such as filing a proof of claim, reviewing pleadings filed and documents received, and taking a 2004 examination, work that a creditor may reasonably perform in a bankruptcy case. The Court has excluded from this category much of the time the Law Firm spent on cash

collateral, the Bank's objection to the Individuals' claims of exemption, the Bank's objections to Debtors' attempts to sell property, and the Bank's corrections to its proof of claim, each of which is discussed separately below.

The Court would expect a creditor in the Bank's position to spend some time preparing its proof of claim, reviewing pleadings filed, and reviewing documents received from the Debtors. But the Law Firm's time in this case far exceeds the amount of time a reasonable creditor would spend. The Law Firm seeks payment for 120.60 hours of work in this category, at a cost of $55,553.50. A review of the time entries, particularly those of O'Brien, show the Law Firm was not simply reviewing the pleadings filed and documents received; it was scrutinizing every pleading and every document in an attempt to ferret out inaccuracies or other grounds to criticize or condemn Debtors. Time spent on that pursuit, including analyzing and discussing Debtors' tax returns or conducting research to determine whether Debtors' expenses exceeded those of similarly situated farmers, did not benefit the Bank, which was at all times an oversecured creditor, with the Debtors in the process of selling parcels of land to pay the Bank in full. The Law Firm's actions exceeded the scope of effective advocacy, and Debtors should not bear the cost of that excess.

Additionally, the Court cannot find the services of a second partner reviewing pleadings to have been reasonable when one partner, who is thoroughly familiar with the case, is already reading every pleading and paper filed or exchanged. The Court's determination of the amount reasonably expended on this matter is set forth below:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
10/9/2020	O'Brien, John A.	Review memo from Debtor's counsel (.1); check status of Bankruptcy filings (.1); memo to Cara regarding same (.1).	0.30	$515.00	$154.50
10/10/2020	O'Brien, John A.	Telephone conversation with Mr. Morrow (.1).	0.10	$515.00	$51.50
10/12/2020	O'Brien, John A.	Review Sirios individual Bankruptcy petition (.1); review Sirios Land Bankruptcy petition (.1); draft two Entries of Appearance (.1).	0.30	$515.00	$154.50
10/12/2020	Nissly, Anita L.	Draft Entry of Appearance for both bankruptcy cases (.4); finalize Entries of Appearance for filing with the court (.1); continue drafting Proof of Claim (.5); draft Motion to Prohibit Use of Cash Collateral (.2).	1.20	$200.00	$240.00
	(time treated separately)	remove cash collateral: draft Motion to Prohibit Use of Cash Collateral (.2).	(0.20)	$200.00	($40.00)
10/13/2020	O'Brien, John A.	Review Debtors Motion to Approve Retainer and related notice in both cases (.3); telephone conversation with	2.70	$515.00	$1,390.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Cara, Dale, and Tyler (.4); memos from and to the title company regarding automatic stay (.1); follow up with Public Trustee regarding automatic stay (.1); draft Two Motion to Prohibit Use of Cash Collateral and proposed orders (.9); memo to Debtor's counsel regarding collateral inspection (.1); memo to Debtor's counsel regarding State Court suggestion of Bankruptcy (.1); telephone conversation with Mr. Morrow regarding information needed for Proof of Claim (.1); review Notices of Reassignment of Judge and update file accordingly (.1); closer review of Bankruptcy petition for incorrect state of liabilities and Creditors Matrix (.2); review applications to employ counsel and related statements and notices in both cases (.3).			
	(time treated separately)	remove cash collateral: draft Two Motion to Prohibit Use of Cash Collateral and proposed orders (.9)	(0.90)	$515.00	($463.50)
10/13/2020	Nissly, Anita L.	Work on invoice for attachment to proof of claim (.8); continue drafting Motion to Prohibit Use of Cash Collateral (.1); draft proposed order granting same (.2); email to public trustee (.1); draft Motion to Prohibit Use of Cash Collateral and proposed order for second bankruptcy case (.3); email from client (.1); email from public trustee (.1); continue drafting proof of claim (.1).	1.80	$200.00	$360.00
	(time treated separately)	remove cash collateral work: continue drafting Motion to Prohibit Use of Cash Collateral (.1); draft proposed order granting same (.2); draft Motion to Prohibit Use of Cash Collateral and proposed order for second bankruptcy case (.3)	(0.60)	$200.00	($120.00)
10/14/2020	Nissly, Anita L.	Work on obtaining invoice for attachment to Proof of Claim (.1); emails from and to public	0.90	$200.00	$180.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		trustee regarding status of bankruptcy notice (.1); email to client regarding same (.1); continue drafting Proof of Claim (.3); review court filings and docket deadlines accordingly (.3).			
10/14/2020	O'Brien, John A.	Review Motion for Joint Administration and related notices in both cases (.3); review invoices from Receiver, bookkeeper and helper for inclusion in proof of claim (.2); telephone conversation with Mr. Brown regarding Equipment Collateral inspection (.1); review Court's deficiency notices for failure to file statements and schedules (.1); memo to Cara regarding status of Debtor's 3 pending motions and court deficiency notice (.1).	0.80	$515.00	$412.00
10/15/2020	Nissly, Anita L.	Begin compiling attachments to Proof of Claim (.1); emails to and from public trustee regarding notices of bankruptcy (.2); emails to client regarding same. (.2); review court filings and docket deadlines accordingly (.2); updates to dist list (.1); updates to pleadings captions (.1); email from client (.1).	1.00	$200.00	$200.00
10/15/2020	O'Brien, John A.	Review orders granting joint administration (.1); review Notice of Appointment of Trustee (.1); review Notice of Meeting of Creditors (.1); memo to Cara regarding same (.1).	0.40	$515.00	$206.00
10/16/2020	Nissly, Anita L.	Continue compiling attachments to Proof of Claim (.1).	0.10	$200.00	$20.00
10/16/2020	O'Brien, John A.	Review memo and invoice from Columbine (.1); memos to Cara regarding status (.1); memo to Borrower's counsel regarding inspection (.1); telephone conversation with Mr. Morrow regarding new collateral inspection (.1).	0.40	$515.00	$206.00
10/19/2020	O'Brien, John A.	Memos from and to Debtor's counsel regarding coordinating inspection and need for	0.30	$515.00	$154.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		inspection (.2); memos to Cara regard same (.1).			
10/20/2020	Nissly, Anita L.	Work on accounting report for Proof of Claim (.3).	0.30	$200.00	$60.00
10/21/2020	O'Brien, John A.	Telephone conversation with Cara (no charge).	0.10	$515.00	$51.50
	(reduction)	remove item listed as no charge	(0.10)	$515.00	($51.50)
10/21/2020	Nissly, Anita L.	Continue work on invoice for attachment to Proof of Claim (.3).	0.30	$200.00	$60.00
10/24/2020	O'Brien, John A.	Review Santander claim and claim docket (.1).	0.10	$515.00	$51.50
10/29/2020	O'Brien, John A. (time treated separately)	Telephone conversation with Mr. Brown regarding equipment inspection and appraisal (.2); memos to and from Cara and Tyler regarding cash collateral and inspection issues (.2); review Chapter 12 Trustee's objection to Motion to Employ Retainer and counsel (.1); review Sirios Land Statements and Schedules and Sirios Statements and Schedules and identify inaccuracies and inconsistencies (.8); review order and Notice of Cash Collateral hearing (.1); telephone conversation with Cara (no charge); work on Response to Motion to Use Cash Collateral (.5).			
		general bankruptcy work: review Chapter 12 Trustee's objection to Motion to Employ Retainer and counsel (.1); review Sirios Land Statements and Schedules and Sirios Statements and Schedules and identify inaccuracies and inconsistencies (.8)	0.90	$515.00	$463.50
11/2/2020	O'Brien, John A. (time treated separately)	Prepare for and attend Cash Collateral hearing (2.9); telephone conversation with Mr. Hepner regarding Cash Collateral issues (.1); memo to Cara regarding same (.1); review and respond to Debtor's budget (.1); telephone conversation with Dale and Tyson (no charge); memo to Debtor's counsel regarding check cashing logistics and			

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Cash Collateral account (.2); memos to Cara and Tanner regarding cash collateral; deposit account and Ranch Sale activities (.3); memos to and from Debtor's counsel regarding scheduling examination (.1); begin preparing for BR 2004 examinations (.4).			
		2004 examination work: memos to and from Debtor's counsel regarding scheduling examination (.1); begin preparing for BR 2004 examinations (.4).	0.50	$515.00	$257.50
11/3/2020	Nissly, Anita L.	Draft Motion for 2004 Exam (.2); draft proposed order granting same (.1); draft Exhibit 3 (.1); draft subpoena (.2); work on compiling attachments to proof of claim (.1).	0.70	$200.00	$140.00
11/3/2020	O'Brien, John A.	Memo to Debtor's counsel regarding examination scheduling (.1); memo to Debtor's counsel regarding protecting cash collateral (.1); memos to and from Cara, Dale and Tyler regarding status of filings and communications with Debtor's counsel (.2); review Order Authorizing Use of Cash Collateral and minutes of the proceeding (.1); continue assembling document for proof of claim (.6); memo to Debtor's counsel regarding suggestion of Bankruptcy (.1); memos from and to Debtor's counsel regarding protection cash collateral (.2).	1.40	$515.00	$721.00
	(time treated separately)	remove cash collateral: memo to Debtor's counsel regarding protecting cash collateral (.1); review Order Authorizing Use of Cash Collateral and minutes of the proceeding (.1); memos from and to Debtor's counsel regarding protection cash collateral (.2).	(0.40)	$515.00	($206.00)
11/4/2020	O'Brien, John A.	Finalize two Proofs of Claim, attachments to Proofs of Claim, and reconcile payoffs and collateral values for	1.20	$515.00	$618.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		inclusion in Proofs of Claim (1.2).			
11/4/2020	Nissly, Anita L.	Continue compiling attachments to proofs of claim (.4); emails from and to court reporter (.1); continue drafting proofs of claim (.8); finalize proofs of claim for filing with the court (.5).	1.80	$200.00	$360.00
11/5/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.2); emails to court reporter regarding 2004 exam (.2); work on information sheet requested by court reporter (.1).	0.50	$200.00	$100.00
11/6/2020	Nissly, Anita L.	Emails from and to court reporter (.1); continue drafting Motion for 2004 Exam including Exhibit 1 and proposed order (.9); finalize Motion for filing with the court and filing of same (.2); email to client regarding court filing (.1).	1.30	$200.00	$260.00
11/6/2020	O'Brien, John A.	Draft Motion for BR 2004 examination of Debtor and analysis of documentation needed of examination (1.7); draft list of documents to be produced (.4); draft proposed B R 2004 order (.1).	2.20	$515.00	$1,133.00
11/10/2020	O'Brien, John A.	Review Motion to Reject existing listing Agreement (.1); review Motion to Approve New Listing Agreement and review Declaration of Broker and new listing agreement (.4).	0.50	$515.00	$257.50
11/10/2020	Sandberg, Scott C.	Review court filings (.2).	0.20	$440.00	$88.00
	(reduction)	remove work duplicating that of another attorney	(0.20)	$440.00	($88.00)
11/11/2020	O'Brien, John A.	Review Order for BR 2004 examination (.1); memos to and from Debtor's counsel regarding examination (.2); memos to Cara regarding examination schedule (.1).	0.40	$515.00	$206.00
11/12/2020	Nissly, Anita L.	Review emails among counsels (.1); emails to and from court reporter (.2); work on completing exam information sheet (.2); email to G. Humphries regarding information needed for exam (.1); email to client regarding same (1); draft Notice of 2004	1.30	$200.00	$260.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Exam (.2); set up sharefile folder for transmission of exhibits to Agreement to Mr. Hepner (.1); email to Mr. Hepner regarding the Agreement and exhibits (.1); review court filings and docket deadlines accordingly (.1); email from court reporter confirming change in date and time (.1).			
11/12/2020	O'Brien, John A.	Draft Notice of Examination (.2); memo to Cara regarding examination (.1); review Debtor's Amended Schedule G and H and Notice of Amendment (.2); review Debtor's Amended Schedules A and B and Notice of Amended Schedules (.2); review memo from Debtor's counsel regarding FSA payments (.1); memos to Cara regarding Meeting of Creditors and FSA payments (.2); prepare for and attend Meeting of Creditors (2.3); separate call with Chapter 12 Trustee (.2).	3.50	$515.00	$1,802.50
11/12/2020	Sandberg, Scott C.	Review court filings (.2).	0.20	$440.00	$88.00
	(reduction)	remove work duplicating that of another attorney	(0.20)	$440.00	($88.00)
11/13/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$200.00	$20.00
11/14/2020	O'Brien, John A.	Review four Proofs of Claim.	0.10	$515.00	$51.50
11/16/2020	O'Brien, John A.	Propose examination exhibits (.9); review memo from Debtor's counsel regarding document production (.1); memo to Cara regarding same (.1).	1.10	$515.00	$566.50
11/16/2020	Nissly, Anita L.	Review emails from G. Humphreys regarding email addresses for debtors (.1); update to dist list (.1); continue drafting exam information sheet for court reporter (.1); finalize information sheet (.1); emails from and to court reporter regarding same (.1); email to client regarding same (.1); work on compiling and labeling exam exhibits (.2); emails to and from court reporter regarding exhibits (.2);	1.70	$200.00	$340.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		draft witness and exhibit list (.2); email to client regarding same (.1); coordinate mailing of exhibits to opposing party and witness (.1); draft direct exam of client (.2); email to client regarding direct exam (.1).			
11/17/2020	Nissly, Anita L.	Continue drafting Witness and Exhibit List and compile and label exhibits (1.1); email to client regarding attendance at 2004 exam (.1); emails to and from the court reporter regarding video conference sign on information for 2004 exam (.2); email to client regarding witness and exhibit list and participation in hearing (.1); work on direct examination (.6); finalize witness and exhibit list (.1); set up sharefile folder for transmission of hearing exhibits (.2); email to G. Humphries regarding hearing exhibits (.1); email to client regarding same (.1); email to client regarding direct exam (.1).	2.70	$200.00	$540.00
11/17/2020	O'Brien, John A.	Legal research on P question raised by the chapter 12 Trustee (1.2); memos to and from the chapter 12 Trustee regarding same (.3); draft exhibit and witness list for cash collateral hearing and assemble exhibits for hearing (1.4); draft Cara's direct examination for the hearing (1.4); memos to and from Car and Tanner regarding examination and cash collateral hearing (.3); prepare for cash collateral hearing (.8); prepare examination exhibits (.2); prepare for Debtor's examination (.7); telephone conference with Cara and Tanner (no charge).	6.30	$515.00	$3,244.50
	(time treated separately)	remove cash collateral: draft exhibit and witness list for cash collateral hearing and assemble exhibits for hearing (1.4); draft Cara's direct	(4.80)	$515.00	($2,472.00)

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		examination for the hearing (1.4); memos to and from Car and Tanner regarding examination and cash collateral hearing (.3); prepare for cash collateral hearing (.8); prepare examination exhibits (.2); prepare for Debtor's examination (.7); telephone conference with Cara and Tanner (no charge).			
11/17/2020	Sandberg, Scott C.	Review court filings related to discovery (.2).	0.20	$440.00	$88.00
	(reduction)	remove work duplicating that of another attorney	(0.20)	$440.00	($88.00)
11/18/2020	O'Brien, John A.	Review order approving employment of Listing Broker (.1); review Trustee's limited objection to motion to approve retainer (.1); prepare for and conduct examination of the debtor (9.0); memos to Cara regarding examination and bankruptcy matters (.2); Telephone conference with Cara (no charge); review memo from Debtor's counsel to court (.1)	9.50	$515.00	$4,892.50
11/18/2020	Nissly, Anita L.	Email to D. Hepner regarding hearing exhibits (.1); email to client regarding same (.1); review emails among counsel and client (.1); review court filings and docket deadlines accordingly (.1).	0.40	$200.00	$80.00
11/19/2020	O'Brien, John A.	Review and organize notes of examination (.6); telephone conference with Cara regarding cash collateral hearing status (no charge); memos from and to Trustee regarding cash collateral hearing (.1); memos from and to court clerk regarding hearing (.1); memo to Debtor's counsel regarding tax returns (.1); closer review of documents produced by Debtor (.3); prepare for and attend cash collateral hearing (.9); memos from Debtor's counsel regarding deposition exhibits and tax refunds (.2); review debtor's 2019 tax returns (.3);	2.70	$515.00	$1,390.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		memo to Cara regarding same (.1).			
	(time treated separately)	remove cash collateral: telephone conference with Cara regarding cash collateral hearing status (no charge); memos from and to Trustee regarding cash collateral hearing (.1); memos from and to court clerk regarding hearing (.1); prepare for and attend cash collateral hearing (.9)	(1.10)	$515.00	($566.50)
11/20/2020	Nissly, Anita L.	Set up sharefile folder (.1); email to G. Humphries regarding deposition exhibits (.1); email to client regarding same (.1).	0.30	$200.00	$60.00
11/20/2020	O'Brien, John A.	Memo to Chapter 12 Trustee regarding discrepancy in Debtor's testimony (.1); memo to Bank regarding same (.1); review proposed cash collateral order (.1); memos from and to Debtor's counsel (.1); review Debtor's Chapter 12 Trustee reports and memo to client regarding same (.2); review memo from Chapter 12 Trustee regarding cash collateral (.1).	0.70	$515.00	$360.50
	(time treated separately)	remove cash collateral: review proposed cash collateral order (.1); memos from and to Debtor's counsel (.1); review memo from Chapter 12 Trustee regarding cash collateral (.1).	(0.30)	$515.00	($154.50)
11/25/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.2).	0.20	$200.00	$40.00
12/1/2020	O'Brien, John A.	Review order permitting rejection of listing agreement (.1).	0.10	$515.00	$51.50
12/2/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$200.00	$20.00
12/8/2020	O'Brien, John A.	Memos from and to Debtor's counsel regarding calling Realtor (.1); memos to Carol (.1); Memos from and to Debtor's counsel, Chapter 12 Trustee and Realtor regarding conference call on sales activities (.2).	0.40	$515.00	$206.00
12/8/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$200.00	$20.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
12/9/2020	O'Brien, John A.	Memos to and from Realtor, Debtor's counsel and Chapter 12 Trustee regarding scheduling (.1); memos to Cora regarding same and status (.1); telephone conference with Cora regarding status report (no charge); review information concerning the Debtor's purchase of farm equipment and the Bank's PMSI (.4); draft Objection to Farm Equipment Exemption and related Notice (.5).	1.10	$515.00	$566.50
	(time treated separately)	remove objection to exemption work: review information concerning the Debtor's purchase of farm equipment and the Bank's PMSI (.4); draft Objection to Farm Equipment Exemption and related Notice (.5).	(0.90)	$515.00	($463.50)
12/10/2020	O'Brien, John A.	Begin preparing for Davig interview (.3).	0.30	$515.00	$154.50
12/11/2020	O'Brien, John A.	Review Appraisal (.8); prior and current listing agreement (.3); prepare for and conduct interview of Mr. Davig re status of sale efforts (2.8); telephone conference with Chapter 12 Trustee re plan alternatives; (.5); telephone conference with Cara re results of Davig interview and plan alternatives (.3).	4.70	$515.00	$2,420.50
12/11/2020	Nissly, Anita L.	Review emails among counsel and client (.1).	0.10	$200.00	$20.00
12/14/2020	O'Brien, John A.	Review memos from Debbie's counsel re sales brochure and Chapter 12 Reporting Call (.1).	0.10	$515.00	$51.50
12/15/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.3).	0.30	$200.00	$60.00
12/15/2020	O'Brien, John A.	Review Deere proof of claim (.1).	0.10	$515.00	$51.50
12/16/2020	O'Brien, John A.	Review memo from Debtor's counsel and amended listing agreement (.1); memo to Cara regarding same (.1).	0.20	$515.00	$103.00
12/17/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$200.00	$20.00
12/18/2020	O'Brien, John A.	Review Sirios individual and Sirios Land Cattle Chapter 12 Trustee reports for November and bank statements on both	0.60	$515.00	$309.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Debtor's DIP account and cash collateral account (.3); review John Deere's 6 proofs of claim asserting conflicting liens on Bank collateral (.2); review State Court order re Automatic Stay (.1).			
12/24/2020	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$200.00	$20.00
12/29/2020	O'Brien, John A.	Review Chrysler's Motion for Relief from Stay (.1); memos from and to Debtor's counsel and Chapter 12 Trustee regarding Receipted Refunds (.2); memos to and from Cara regarding same (.1).	0.40	$515.00	$206.00
12/30/2020	O'Brien, John A.	Review notices of insurance cancellations (.1); five memos from and to Cara regarding same (.1); memos to Debtor's counsel and Chapter 12 Trustee regarding same and scheduling follow up call with Becky (.3).	0.50	$515.00	$257.50
1/6/2021	O'Brien, John A.	Telephone conference with Cara (no charge); memo to Broker, Trustee and Debtors counsel regarding scheduling (.1); memo to Cara (no Charge).	0.10	$535.00	$53.50
1/8/2021	O'Brien, John A.	Brief review of Chapter 12 Plan (.3); prepare for and call with Debtor's counsel, Mr. Hepner and Mr. Davig (1.2) telephone conference with Cara (no charge).	1.50	$535.00	$802.50
1/11/2021	O'Brien, John A.	Telephone conference with Cara, Taylor and Ty to review Plan and Bank's concerns (.6).	0.60	$535.00	$321.00
1/14/2021	O'Brien, John A.	Review Certificates of Non-Contested matter on Attorney Fee Application and Retainers (.1) review Order Approving employment (.1).	0.40	$535.00	$214.00
1/15/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$220.00	$22.00
1/19/2021	O'Brien, John A.	Memo to Debtor's counsel and Chapter 12 Trustee (.1); telephone conference with Mr. Brown regarding collateral inspection (.1).	0.20	$535.00	$107.00
1/24/2021	O'Brien, John A.	Memos from and to Mr. Humphries regarding inspection (.1); memo to	0.30	$535.00	$160.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Inspector Brown (.1) memos to Cara regarding inspection (.1).			
1/26/2021	O'Brien, John A.	Memo to Debtor's counsel regarding inspector (.1); memo to Chapter 7 Trustee regarding Plan (.1); memo to Cara regarding status (.1).	0.30	$535.00	$160.50
1/27/2021	O'Brien, John A.	Memos from and to Chapter 7 Trustee regarding plan (.1); memos to and from Cara regarding status (.1); memo to Debtor's counsel (.1); review memo from Debtor's counsel regarding Sales Contracts (.1); review Lyons Sales Contract (.4); review Westberg Sales Contract (.4); memo to Cara regarding contracts (.1); begin Drafting motion for Relief from Stay regarding Sales Contracts (.3).	1.50	$535.00	$802.50
	(time treated separately)	remove relief from stay work: begin Drafting motion for Relief from Stay regarding Sales Contracts (.3).	(0.30)	$535.00	($160.50)
1/31/2021	O'Brien, John A.	Review Sirios individual Chapter 12 Report for November (.1); review Sirios Land and Cattle Chapter 12 Report for November (.1); review Sirios Chapter 12 Plan and close review of Sirios Cash Flow (.9); review Sirios deposition testimony for inconsistencies between Plan and Debtor's deposition testimony (2.3).	3.40	$535.00	$1,819.00
2/1/2021	O'Brien, John A.	Prepare for and lengthy telephone conference with Chapter 12 Trustee (.9); review sales contracts, including contract termination date (.2).	1.10	$535.00	$588.50
2/2/2021	O'Brien, John A.	Lengthy telephone conference with Cara regarding determining acceptable and unacceptable provisions in the Plan which Debtor's counsel did not discuss with the Bank prior to filing (.8); memo to Chapter 12 Trustee regarding Bank plan to accommodations (.9); review memo from Debtor's counsel (.1); review contract to sell 80 acres (.3); memo to Cara regarding	2.40	$535.00	$1,284.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		contracts and plan input (.2); review sale map (.1).			
2/8/2021	O'Brien, John A.	Telephone conference with Chapter 12 Trustee regarding land sale (.1).	0.10	$535.00	$53.50
2/10/2021	O'Brien, John A.	Telephone conference with Chapter 12 Trustee re plan objections; (.3); memos from Debtor's counsel (.1); review Extension of Contracts (.1).	0.50	$535.00	$267.50
2/11/2021	O'Brien, John A.	Review memo from Debtor's counsel (.1); review Debbie's Chapter 12 Reports for December (.2); memo to Chapter 12 Trustee regarding Milo (.1); telephone conference with Chapter 12 Trustee regarding plan (.1); closer review of Plan; draft acceptable modifications to the Plan and objections to current Plan (3.8); lengthy review regarding recent cases on confirmation and the circumstances of Sirios case (.6).	4.90	$535.00	$2,621.50
2/13/2021	O'Brien, John A.	Review Debtor's Stipulation with Santander (.1) review extensions of two sales contracts (.1).	0.20	$535.00	$107.00
2/15/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$220.00	$22.00
2/15/2021	O'Brien, John A.	Telephone conference with Chapter 12 Trustee regarding plan objections and stipulated plan (.2); memo to Cara (.1).	0.30	$535.00	$160.50
2/16/2021	O'Brien, John A.	Review memo from Debtor's counsel regarding Trustee Reports (.1); memos to and from Cara regarding same and plan confirmation issues (.2).	0.30	$535.00	$160.50
2/17/2021	O'Brien, John A.	Review Trustee's Objection to Chapter 12 Plan (.2).	0.20	$535.00	$107.00
2/17/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.2).	0.20	$220.00	$44.00
2/18/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.2).	0.20	$220.00	$44.00
2/18/2021	O'Brien, John A.	Telephone conference with Chapter 12 Trustee regarding hearing (.1).	0.10	$535.00	$53.50
2/22/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$220.00	$22.00
2/24/2021	O'Brien, John A.	Review Debtor's Motion to Sell Property by 3 contracts (.4); telephone conference with	1.50	$535.00	$802.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Chapter 12 Trustee (.1); memo to Debtor's counsel regarding try to settle sales objection (.1); draft limited objection to sales motion (.9).			
	(time treated separately)	remove work on objection to sale: draft limited objection to sales motion (.9).	(0.90)	$535.00	($481.50)
2/25/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.2).	0.20	$220.00	$44.00
2/25/2021	O'Brien, John A.	Finalize Limited Objection to Sale Motion (.4); memos from and to Debtor's counsel regarding trying to resolve sale objection (.2); review Owen contract (.2); memos to Cara regarding new contract and sale motion (.2); telephone conference with Chapter 12 Trustee (.1).	1.10	$535.00	$588.50
	(time treated separately)	remove work on objection to sale: Finalize Limited Objection to Sale Motion (.4)	(0.40)	$535.00	($214.00)
2/26/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$220.00	$22.00
2/26/2021	O'Brien, John A.	Memos from and to Debtor's counsel regarding hoarding cash collateral (.1).	0.10	$535.00	$53.50
2/26/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$220.00	$22.00
2/26/2021	O'Brien, John A.	Memos from and to Debtor's counsel regarding hoarding cash collateral (.1).	0.10	$535.00	$53.50
3/1/2021	O'Brien, John A.	Memos from and Debtor's counsel (.1); two telephone conferences with Chapter 12 Trustee regarding sale motions and cash collateral (.2); memos to Cara regarding same (.1); review proposed stipulation and proposed orders approving sale and stipulation (.1).	0.50	$535.00	$267.50
3/2/2021	O'Brien, John A.	Telephone conference with Dale, Tanner and Dean regarding status of land sales and stipulations (.3); e-mails to Debtor's counsel and Trustee regarding stipulations (.1); memos to Cara and Dale regarding same.	0.50	$535.00	$267.50
3/3/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.2); email to client regarding court filings (.1).	0.30	$220.00	$66.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
3/3/2021	O'Brien, John A.	Memos to Cara (no charge); review order approving stipulation (.1); review order approving sale motions (.1); memo to Borrower's counsel regarding coordinating closing (.1).	0.30	$535.00	$160.50
3/4/2021	Nissly, Anita L.	Document management (.1).	0.10	$220.00	$22.00
3/4/2021	O'Brien, John A.	Memos from and to Debtor's counsel regarding closing logistics (.1); memos to and from Cara and Shelly regarding same (.1).	0.20	$535.00	$107.00
3/5/2021	O'Brien, John A.	Review settlement sheet (.1); memo to Cara regarding same (.1); telephone conference with Chapter 12 Trustee regarding plan deadlines and Banks Stipulation to a Trustee Sale protocol (.3).	0.50	$535.00	$267.50
3/6/2021	O'Brien, John A.	Memo to Land Title, Debtor's counsel, the Realtor and Chapter 12 Trustee regarding closing protocol (.5); memo to Cara regarding same (.1); review and reconcile sales contracts and land under contract (.2); review order approving 3 land sales contracts and a stipulation (.1).	0.90	$535.00	$481.50
3/8/2021	O'Brien, John A.	Memos from and to title company regarding releases (.5); several telephone conferences with Cara regarding releases (.4) work with Bank of Partial Releases (.5); telephone conferences with Mr. Hepner (.1); review existing lien on parcel sold (.1); work on withdrawal of foreclosure (.1); review revised plan (.5); memo to Mr. Humphrey regarding revised plan (.1).	2.30	$535.00	$1,230.50
3/8/2021	Nissly, Anita L.	Email to Weld County Public Trustee (.1).	0.20	$220.00	$44.00
3/9/2021	O'Brien, John A.	Memo to title company (.1); telephone conference with title company regarding delay in today's closing (.1); telephone conference with Cara regarding release documentation (.1); memo to Chapter 12 Trustee and Debtor's counsel regarding	0.80	$535.00	$428.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		information needed for land sales and production of releases (.1); telephone conference with Public Trustee regarding withdrawal of foreclosure (.2); memo to title company and Chapter 12 Trustee regarding same (.1); notice of withdrawal of foreclosure (.1).			
3/9/2021	Nissly, Anita L.	Emails from and to Public Trustee regarding telephonic meeting (.1); telephone call with Public Trustee and attorney (.2); draft Withdrawal of Notice of Election and Demand (.1); finalize Withdrawal of Notice of Election and Demand (.1); email from Public Trustee regarding final invoice and withdrawal (.1); review email from counsel to parties regarding same (.1); email to Public Trustee regarding Withdrawal of Notice of Election and Demand (.1); email to client regarding same (.1).	0.90	$220.00	$198.00
3/10/2021	O'Brien, John A.	Review memo from title company, settlement statement and legal description for closing # 2 (.1); memos from and to Cara regarding responding to Debtor's request for informal discovery from the Bank (.1); telephone conference with Chapter 12 Trustee (.2).	0.40	$535.00	$214.00
3/11/2021	O'Brien, John A.	Review memo from title company and settlement sheet for closing #2 (.1).	0.10	$535.00	$53.50
3/12/2021	O'Brien, John A.	Telephone conference with Mr. Hepner (.1); telephone conference with Cara and loan committee on revised plan sale milestones (.3); memo to Trustee and Debtor's counsel on unresolved plan objections (.6).	1.00	$535.00	$535.00
3/13/2021	O'Brien, John A.	Review memo from Debtor's counsel with plan objection responses (.1); memo to Cara (.1).	0.20	$535.00	$107.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
3/16/2021	Nissly, Anita L.	Emails from and to Public Trustee (.1); email to client (.1).	0.20	$220.00	$44.00
3/16/2021	O'Brien, John A.	Review memo from Debbie's counsel regarding monthly operating report (.1); review memo from Public Trustee regarding foreclosure withdrawal (.1); memos to Cara regarding monthly reports and foreclosure status (.1).	0.30	$535.00	$160.50
3/17/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$220.00	$22.00
3/17/2021	O'Brien, John A.	Review memo from Debtor's counsel and monthly operating reports for both Debtor's DIP Accounts and Cash Collateral Accounts (.3).	0.30	$535.00	$160.50
3/18/2021	O'Brien, John A.	Telephone conference with Chapter 12 Trustee (.2); review Amended Chapter 12 Plan (.5); memos from and to Cara regarding information Trustee Request (.1) memo to Chapter 12 Trustee regarding status of sale (.1).	0.90	$535.00	$481.50
3/19/2021	O'Brien, John A.	Continue reviewing Amended Plan (.3); telephone conference with Cara and loan committee regarding plan comments (.3); telephone conference with Mr. Hepner regarding plan consent to some ideas and objections to other items (.2).	0.80	$535.00	$428.00
3/19/2021	Nissly, Anita L.	Email to client regarding payoffs (.1); begin drafting Amended Proofs of Claims (.4).	0.50	$220.00	$110.00
	(time treated separately)	remove work on claim amendment: begin drafting Amended Proofs of Claims (.4).	(0.40)	$220.00	($88.00)
3/22/2021	O'Brien, John A.	Analysis of Debtor's financial plan and budget to set aside $40,000 and identify duplicate expenditure (.1); review Debtor's motion to sell property (.3); review amended motion to sell property and related notice (.3); draft objection (.8).	1.50	$535.00	$802.50
	(time treated separately)	remove work on objection to sale: draft objection (.8).	(0.80)	$535.00	($428.00)
3/23/2021	Sandberg, Scott C.	Review court filings.	0.20	$475.00	$95.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
	(reduction)	remove work duplicating that of another attorney	(0.20)	$475.00	($95.00)
3/23/2021	O'Brien, John A.	Draft Amended Proof of Claim (.3); review memo from title company and settlement statement for closing number 3 (.2); memo to title company (.1).	0.60	$535.00	$321.00
	(time treated separately)	remove work on claim amendment	(0.30)	$535.00	($160.50)
3/25/2021	O'Brien, John A.	Review memos from Debtor's counsel regarding new sale (.1); memo to Cara re same (.1).	0.20	$535.00	$107.00
3/26/2021	O'Brien, John A.	Review memo from title company regarding closings (.1); memo to Chapter 12 Trustee regarding same (.1); memos to Cara (no charge).	0.20	$535.00	$107.00
3/28/2021	O'Brien, John A.	Review Order Setting Preliminary sales hearing.	0.10	$535.00	$53.50
3/29/2021	O'Brien, John A.	Review loan payment histories (.2); telephone conference with Cara regarding same (.1) review cattle sale documentation requested by Mr. Humphries and memo to Mr. Humphries regarding same (.3); memo to Mr. Humphries regarding payoffs he requested (.1); memos to and from Mr. Humphries regarding stipulation on contested sale motion (.2); closer review of Amended Chapter 12 plan (.4).	1.30	$535.00	$695.50
4/1/2021	O'Brien, John A.	Memos from and to Cara regarding land sale response (.2); review Trustee objection to Chapter 12 Plan (.2); review Debtor's second motion to use cash collateral (.4); draft objection to Debtor's second motion to use cash collateral (.5); review memo from Debtor's counsel and Owen's contract extension (.1); prepare for and attend preliminary hearing motion to approve 4th sale motion (1.0); telephone conference with Chapter 12 Trustee (.1); draft motion for relief from stay (1.8); memos from and to Cara (.1).	4.40	$535.00	$2,354.00
	(time treated separately)	remove cash collateral objection work: draft objection	(0.50)	$535.00	($267.50)

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		to Debtor's second motion to use cash collateral (.5)			
	(time treated separately)	remove relief from stay work: draft motion for relief from stay (1.8)	(1.80)	$535.00	($963.00)
	(time treated separately)	remove work on objection to sale: prepare for and attend preliminary hearing motion to approve 4th sale motion (1.0)	(1.00)	$535.00	($535.00)
4/5/2021	Sandberg, Scott C.	Review court filings (.3).	0.30	$475.00	$142.50
	(reduction)	remove work duplicating that of another attorney	(0.30)	$475.00	($142.50)
4/6/2021	O'Brien, John A.	Memos from and to Debtor's counsel (.1); memos to Cara (.1).	0.20	$535.00	$107.00
4/7/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.3).	0.30	$220.00	$66.00
4/5/2021	Sandberg, Scott C.	Review court filings (.3).	0.30	$475.00	$142.50
	(reduction)	remove work duplicating that of another attorney	(0.30)	$475.00	($142.50)
4/6/2021	O'Brien, John A.	Memos from and to Debtor's counsel (.1); memos to Cara (.1).	0.20	$535.00	$107.00
4/7/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.3).	0.30	$220.00	$66.00
4/7/2021	O'Brien, John A.	Review Debtor's "corrected" Plan (.8); prepare for and attend preliminary confirmation hearing (1.5); telephone conference with Chapter 12 Trustee (.1); memos to and from Cara regarding remaining issues (.2); review memo from Debtor's counsel regarding land offer and memo to Craig regarding same (.1); review memo from Debtor's counsel regarding payoffs and memo to Cara regarding same (.1).	2.80	$535.00	$1,498.00
	(time treated separately)	remove work on confirmation: prepare for and attend preliminary confirmation hearing (1.5)	(1.50)	$535.00	($802.50)
4/8/2021	O'Brien, John A.	Memos from and to Borrower's counsel regarding new contract and cash collateral (.3); memos to Cara regarding same (.1).	0.40	$535.00	$214.00
4/9/2021	O'Brien, John A.	Memos from and to Cara regarding claims and status (.1).	0.10	$535.00	$53.50
4/9/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.3).	0.30	$220.00	$66.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
4/11/2021	O'Brien, John A.	Review Magnum Contract on irrigated and pasture land (.3); memo to Cara (.1).	0.40	$535.00	$214.00
4/12/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.5).	0.50	$220.00	$110.00
4/12/2021	O'Brien, John A.	Telephone conference with Cara regarding proposed sale #5 (.3); memos from and to Mr. Humphries and Mr. Hepner regarding scheduling (.1); memos to Cara regarding same (.1).	0.50	$535.00	$267.50
4/13/2021	O'Brien, John A.	Review memo from Debtor's counsel regarding cash collateral and memo to Cara regarding same (.1).	0.10	$535.00	$53.50
4/14/2021	O'Brien, John A.	Memo from title company regarding 4th closing and memo to Cara (.1); memo to Chapter 12 Trustee regarding 4th closing (.1); memos from and to title company regarding 5th sale (.1); review Motion to Sell Real Estate (5th sale) and related Notice (.4); review motion to shorten notice (.1); memo to Debtor's counsel and the Chapter 12 Trustee regarding not objection to motion (.1); memo to Cara regarding same (.1).	1.00	$535.00	$535.00
4/15/2021	O'Brien, John A.	Memos from and to John Deere's counsel regarding John Deere claim (.1); review memo from Debtor's counsel regarding delay in 4th sale closing (.1); memos to Cara regarding same (.1); telephone conference with John Deere's counsel regarding claim treatment (.2); review memo from Debtor's counsel regarding survey and cash collateral (.1); memos from and to Debtor's counsel regarding cash collateral issues (.2).	0.80	$535.00	$428.00
4/16/2021	O'Brien, John A.	Review memo from Debtor's counsel regarding use of cash collateral (.1); memo to Cara regarding same (.1).	0.20	$535.00	$107.00
4/16/2021	Nissly, Anita L.	Review loan history provided by client (.1); review court filings and docket deadlines accordingly (.2).	0.30	$220.00	$66.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
4/17/2021	O'Brien, John A.	Review Carmax proof of claim (.1); review Order Shortening Time to Object to Land Sale (.1).	0.20	$535.00	$107.00
4/18/2021	O'Brien, John A.	Compare Debtors stated expenses to CSU stated average expenses (.3); review Debtor's Objection to Bank claim and research same (.3); memo to Debtor's counsel (.1); review Debtor's monthly financial reports for available cash and request to use more cash collateral (.2); memo to Cara regarding same (.1); review Debtor's Stay Relief Stipulation with Santander and refusal of some terms with Bankwest (.2); review Court's Minute Order setting deadlines and hearings on all pending matters (.1); review and identify errors in Debtor's newest cash flow projection dated April 15, 2021 (.3); closer review of Sales Contract for 5th sale and address broken pivot issue (.2); memo to Debtor's counsel regarding same (.1); review Debtor's most recent plan dated April 14 and memo to Cara regarding same (.6); begin drafting objection to April 14 plan (.2); begin preparing exhibits and witness list for preliminary hearing on Motion for Relief from Stay (.3); review Debtor's proposed cash collateral stipulation (.3); memo to Debtor's counsel regarding same (.1).	3.40	$535.00	$1,819.00
	(time treated separately)	remove work on objection to proof of claim: review Debtor's Objection to Bank claim and research same (.3); memo to Debtor's counsel (.1)	(0.40)	$535.00	($214.00)
	(time treated separately)	remove work on motion for relief from stay: begin preparing exhibits and witness list for preliminary hearing on Motion for Relief from Stay (.3)	(0.30)	$535.00	($160.50)
	(time treated separately)	remove work on plan confirmation: begin drafting objection to April 14 plan (.2)	(0.20)	$535.00	($107.00)

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
4/21/2021	O'Brien, John A.	Review memo from Debtor's counsel regarding Trustee's reports; memo to Cara (.1); memos from and to Debtor's counsel regarding cash collateral use and survey (.2); review memo from Humphries regarding Owens 4th contract extension and review extension (.1); memo to Cara regarding same (.1).	0.50	$535.00	$267.50
4/22/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$220.00	$22.00
4/22/2021	O'Brien, John A.	Review memo from title company and settlement statement and closing documents for closing #4 (.3).	0.30	$535.00	$160.50
4/23/2021	O'Brien, John A.	Review memo from title company regarding 4th closing settlement sheet (.2); work on Exhibit and witness list for motion for relief from stay (.4).	0.60	$535.00	$321.00
	(time treated separately)	remove work on motion for relief from stay: work on Exhibit and witness list for motion for relief from stay (.4).	(0.40)	$535.00	($214.00)
4/24/2021	O'Brien, John A.	Review Sirios Land monthly Chapter 12 Trustee reports for March (.2); review certificate of non-contested matter regarding 5th sales contract (.1).	0.30	$535.00	$160.50
4/26/2021	Sandberg, Scott C.	Review court filings (.3).	0.30	$475.00	$142.50
	(reduction)	remove work duplicating that of another attorney	(0.30)	$475.00	($142.50)
4/26/2021	O'Brien, John A.	Review memo from and to title company and settlement sheet on 4th closing (.1); memos to and from Cara regarding same (.1); telephone conference with Cara regarding cash collateral and preliminary hearing (.1); review Debtor's motion for corrected sale order and entered order (.1); review Debtor's Emergency and Supplemented Order to Use Cash Collateral (.9); analysis of Debtor's cash collateral needs and draft response to emergency motion (1.9); review order setting hearing on Motion (.1).	3.30	$535.00	$1,765.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
	(time treated separately)	remove work on cash collateral objection: telephone conference with Cara regarding cash collateral and preliminary hearing (.1); review Debtor's Emergency and Supplemented Order to Use Cash Collateral (.9); analysis of Debtor's cash collateral needs and draft response to emergency motion (1.9); review order setting hearing on Motion (.1).	(3.00)	$535.00	($1,605.00)
4/28/2021	O'Brien, John A.	Review memo from Mr. Humphries regarding revised tax amount (.1); memos to Cara regarding status (.1).	0.20	$535.00	$107.00
4/29/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.2).	0.20	$220.00	$44.00
4/30/2021	O'Brien, John A.	Review memo from title company regarding 5th closing (.1); review memo from Debtor's counsel regarding easement (.3); memo to Debtor's counsel regarding easement (.1); memo to Cara regarding same (.1).	0.60	$535.00	$321.00
5/2/2021	O'Brien, John A.	Review memo from Magnum's counsel and information on proposed easement (.4); memo to Magnum's counsel and Chapter 12 Trustee regarding proposed easement (.1).	0.50	$535.00	$267.50
5/3/2021	O'Brien, John A.	Telephone conference with Cara regarding easement (.1); memos to Debtor's counsel, Trustee and Buyer's counsel regarding easements (.4); memos to and from Debtor's counsel and review contract extension (.3); review memo from Buyer's counsel, memo to Debtor's counsel regarding cash collateral (.1); review proposed easement (.2).	1.10	$535.00	$588.50
5/4/2021	O'Brien, John A.	Review proposed stipulated order for use of cash collateral (.2); memos to and from Debtor's counsel regarding same (.1); memos from and to Chapter 12 Trustee regarding auction expenses (.1); memos to Cara regarding same and status (.3); review draft	1.50	$535.00	$802.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		subordination (.4); review order authorizing use of cash collateral (.1); memos from and to Debtor's counsel, Chapter 12 Trustee and Magnum's counsel regarding subordination (.3).			
5/5/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$220.00	$22.00
5/5/2021	O'Brien, John A.	Telephone conference with Cara regarding subordination of easement (.2); memos to and from Debtor's counsel and Chapter 12 Trustee regarding same and scope of easement (.3); memos to Cara regarding same (.1).	0.60	$535.00	$321.00
5/6/2021	Nissly, Anita L.	Draft Subordination Agreement (1.0).	1.00	$220.00	$220.00
5/6/2021	O'Brien, John A.	Closer review of Easement (.3) review Davig Report (.3); memo to Humphries regarding alerting Humphries to weakness of easement (.2); draft subordination of easement (.5); memo to Mr. Humphries and Debtor's counsel regarding subordination (.1); memo to title company re subordination (.1).	1.60	$535.00	$856.00
5/7/2021	O'Brien, John A.	Review newest revised easement (.2); memo to Debtor's counsel and Chapter 12 Trustee regarding same (.1); review application to extend listing period and order granting application (.3); review verified statement or Davig (.1); review two exclusions of the Magnum Contract (.3); review version 5 of the Easement and memo to Debtor's counsel regarding same (.4); review Debtor's most recent Plan (1.2); review Debtor's Amended Plan dated April 14 (.9); draft objections to Debtor's most recent plan (1.2); review Debtor's objection to claim - $350,000 Note interest rate (.4); analyze Debtor's objection and telephone conference with Cara regarding same (.5); draft	5.40	$535.00	$2,889.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		response to claim objection (.4); review Debtor's and Magnum's proposed revisions to subordination agreement and revise subordination agreement (.8).			
	(time treated separately)	remove work on objection to Bank's proof of claim: review Debtor's objection to claim - $350,000 Note interest rate (.4); analyze Debtor's objection and telephone conference with Cara regarding same (.5); draft response to claim objection (.4)	(1.30)	$535.00	($695.50)
	(time treated separately)	remove work on plan confirmation: draft objections to Debtor's most recent plan (1.2)	(1.20)	$535.00	($642.00)
5/7/2021	Nissly, Anita L.	Draft Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) (.5); revisions to Subordination Agreement (.3); finalize Subordination Agreement (.1); email to G. Humphries and D. Hepner regarding same (.1); email to client regarding same (.1); finalize Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) for filing with the court (.1); continue drafting Objection to Motion to Approve Plan (.5)	1.70	$220.00	$374.00
	(time treated separately)	remove work on objection to Bank's proof of claim: Draft Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) (.5); finalize Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) for filing with the court (.1);	(0.60)	$220.00	($132.00)
	(time treated separately)	remove work on plan confirmation: continue drafting Objection to Motion to Approve Plan (.5)	(0.50)	$220.00	($110.00)
5/9/2021	O'Brien, John A.	Closer review of appraisal value per irrigated acre and	0.30	$535.00	$160.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		gross acre compared to Magnum Price and memo to Cara regarding same (.3).			
5/10/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.1).	0.10	$220.00	$22.00
5/10/2021	O'Brien, John A.	Review memo from title company regarding approval of subordination agreement (.1); memo to Cara regarding same (.1).	0.20	$535.00	$107.00
5/12/2021	O'Brien, John A.	Review Trustee's motion for additional time to object to plan (.1); review motion to shorten time to object to sale (.1); review Trustee's objection to Plan (.1); review order shortening objection period and memo to Cara regarding same and notice of objection deadline (.1); review Debtor's motion for authority to convey property-easement, and proposed easement and subordination agreement (.4); telephone conference with Cara regarding sale status (.1); memo to title company regarding release and subordination documents (.1); memo to Cara regarding same (.1); memo to Debtor's counsel and Chapter 12 Trustee regarding Bank's no objection to sale motion (.1).	1.20	$535.00	$642.00
5/13/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly on plan confirmation (.2).	0.20	$220.00	$44.00
5/13/2021	O'Brien, John A.	Review memo from title company regarding closing (.1); review FBN Inputs proof of claim (.1).	0.20	$535.00	$107.00
5/14/2021	Nissly, Anita L.	Review email from client to counsel (.1); email to client (.1); review hearing orders and email to counsels regarding same (.1).	0.30	$220.00	$66.00
5/18/2021	O'Brien, John A.	Review updated payoffs and send to Debtor's counsel (.3); memos to and from Chapter 12 Trustee (.2); Telephone conference with Chapter 12 Trustee (.2); review corrected plan (.6); review correction to corrected plan (.2); two telephone conferences with	2.30	$535.00	$1,230.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Cara regarding new plan (.3); memos to Debtor's counsel regarding plan (.2); another telephone conference with Chapter 12 Trustee (.2); memo to title company regarding closing (.1)			
5/19/2021	O'Brien, John A.	Memos from and to Debtor's counsel regarding payoffs and payoff stipulation (.2); work on Cara testimony (.2) memos from and to Cara regarding providing information Borrower requests, settlement, status and hearing preparation (.7); review memo from title company regarding closing (.1); work on Exhibit and witness list. (.1); telephone conference with Chapter 12 Trustee regarding Trustee's comments on stipulation (.2); review memo from Debtor's counsel regarding comments to stipulation (.1) revise stipulation (.4); telephone conference with Cara regarding stipulation (.2)	2.10	$535.00	$1,123.50
	(time treated separately)	remove work on plan confirmation: work on Cara testimony (.2) memos from and to Cara regarding providing information Borrower requests, settlement, status and hearing preparation (.7); work on Exhibit and witness list. (.1);	(0.90)	$535.00	($481.50)
5/21/2021	Nissly, Anita L.	Finalize Stipulation (.1); efile Stipulation with the court (.1); continue assisting attorney with hearing preparations (.1); review court filings and docket deadlines accordingly (.1).	0.40	$220.00	$88.00
5/25/2021	O'Brien, John A.	Memos from and to Cara regarding past confirmation interest rate (.1).	0.10	$535.00	$53.50
5/25/2021	Nissly, Anita L.	Document management (.2).	0.20	$220.00	$44.00
5/26/2021	Nissly, Anita L.	Review court filings and docket deadlines accordingly (.2).	0.20	$220.00	$44.00
5/29/2021	O'Brien, John A.	Review Debtor's Objection to Claim of FBN Inputs and related Notice (.1).	0.10	$535.00	$53.50
		All time entries above:	**146.50**		**$68,501.50**
		Time treated separately (in other categories):	**(25.90)**		**($12,948.00)**

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Amount sought in this category:	**120.60**		**$55,553.50**
		Amount not shown to be reasonable:	**(1.80)**		**($838.00)**
		Subtotal:	**118.80**		**$54,715.50**
		50% reduction:	**(59.40)**		**($27,357.75)**
		Remaining amount:	**59.40**		**$27,357.75**

The Court finds the time sought to be excessive and a 50% reduction to be appropriate, with the remaining amount, 59.40 hours, reasonably expended on this matter. The Court finds each timekeeper's hourly rate to be reasonable. Accordingly, the Court finds the total of $27,357.75 to be a reasonable lodestar amount for this matter.

G. Cash Collateral Objections

Debtors required the use of cash collateral to operate the Company's business and to pay the Individuals' living expenses. The Bank argues it agreed to Debtors' use of cash collateral, which would have been a reasonable approach for an oversecured creditor in a case with a 100% payment plan. But, the Bank's actions in this case cannot be described as reasonable.

Almost immediately after Debtors filed their bankruptcy petitions, the Bank filed a Motion to Prohibit Debtors' use of its cash collateral (docket #5). The Bank did not address the "adequate protection" standards applicable in Chapter 12 cases, which are less stringent than the standards applicable in Chapter 11 cases. The Bank did not address how its equity cushion would be lost or diminished in value during the pendency of Debtors' bankruptcy cases.

Debtors filed an Expedited Cash Collateral Motion on October 27, 2020 (docket #20), asserting an immediate need for the use of $33,251.24 of cash collateral for the following expenses:

- $2,699.88 for October utilities and $4,100 for November utilities to Morgan County REA;
- $5,500 for maintenance and repair expenses to Wiggins Farm and Auto Supply, Country Do It Best Hardware, 4 Rivers John Deere, and Rudy's GTO;
- $4,815 for diesel to Stub's Gas and Oil;
- $2,875 to John Deere for Skid Steer lease payments;
- $1,734.18 for October and November payments to Chrysler Capital for payments on the 2018 Dodge Ram 3500;
- $882.79 to vehicle licenses and tags;
- $1,945 to Farmers Union Insurance and Secura Insurance for crop and farm insurance; and
- $8,700 ($4,350/month) for living expenses including food, health insurance and ongoing medical bills.

Debtors also attached a budget setting forth the following proposed uses of cash collateral:

Wm Tyler and Bridget Sirios Oct - Mar 2021 Budget							
	Total	Past Due+Oct	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21
Income	$ -						
Wheat	$ 56,776.90	$ 56,776.90					
Milo	$ 67,000.00			$ 67,000.00			
Custom	$ 25,200.80		$ 25,200.80				
Total Income	$ 148,977.70	$ 56,776.90	$ 25,200.80	$ 67,000.00			
Living Expeses	$ 26,100.00	$ 4,350.00	$ 4,350.00	$ 4,350.00	$ 4,350.00	$ 4,350.00	$ 4,350.00
Utilities	$ 16,899.88	$ 2,699.88	$ 4,100.00	$ 1,500.00	$ 4,100.00	$ 1,500.00	$ 3,000.00
Maint and Repairs	$ 8,600.00	$ 3,500.00	$ 2,000.00	$ 200.00	$ 200.00	$ 200.00	$ 2,500.00
Diesel	$ 11,314.99	$ 1,547.65	$ 3,267.34	$ 1,000.00	$ 1,000.00	$ 1,000.00	$ 3,500.00
330G Skid Steer Lease	$ 5,698.80	$ 2,168.30	$ 706.10	$ 706.10	$ 706.10	$ 706.10	$ 706.10
2018 Dodge Ram 3500	$ 5,202.54	$ 867.09	$ 867.09	$ 867.09	$ 867.09	$ 867.09	$ 867.09
Taxes/Licenses/Tags	$ 882.79	$ 882.79					
Crop Insurance	$ 679.00	$ 679.00					
Farm Insurance	$ 1,266.00	$ 1,266.00					
Auto Insurance	$ 2,652.00			$ 2,652.00			
Chemical/Fertilizer	$ 26,863.12			$ 26,863.12			
Total Oper. Expenses	$ 106,159.12	$ 17,960.71	$ 15,290.53	$ 38,138.31	$ 11,223.19	$ 8,623.19	$ 14,923.19
Total - Income minus Expenses monthly	$ 42,818.58	$ 38,816.19	$ 9,910.27	$ 28,861.69	$ (11,223.19)	$ (8,623.19)	$ (14,923.19)
Cash Flow	$ 42,818.58	$ 81,634.77	$ 91,545.04	$ 120,406.73	$ 109,183.54	$ 100,560.35	$ 85,637.16

The Bank filed an Objection (Docket #27). The Bank's Objection did not address the specific numbers Debtors requested in their Motion; it simply argued Debtors had not provided enough information or demonstrated sufficient need for the use of cash.

At the preliminary hearing on the Debtors' Motion, held on November 2, 2020, both O'Brien and Sandberg appeared on behalf of the Bank. As in its Objection, the Bank argued Debtors had not provided sufficient information. The Court disagreed, finding Debtors had sufficiently shown the amounts needed, which amounts were reasonable. The Court approved Debtors' interim use of cash collateral (docket #30) and set a final hearing for November 19, 2020. On November 19, the parties appeared before the Court and announced a stipulation providing for Debtors' use of cash collateral through December 31, 2020.

Debtors filed a second Cash Collateral Motion on March 19, 2021 (Docket #106), seeking authority to use cash collateral (including $68,335.78 held in the Company's DIP account) for the following expenses:

- $10,240 for real estate taxes to the Weld County Treasurer due April 30, 2021;
- $18,243 to QBE for Debtors' blanket Farm Policy due May 2021;
- $11,092 for fertilizer- ($9,992 in April for Wheat), ($1,100 in May for Milo);
- $10,000 for estimated fuel expense to Stub's Gas and Oil;
- $7,000 for estimated utilities to Morgan County REA and Roggen Elevator;
- $4,000 for milo seed;
- $6,000 for anticipated maintenance & repair expenses and supplies;
- $796 to John Deere for the Skid Steer May lease payment;
- $867 to Santander for the May payment on the 2018 Dodge Ram 3500 (Family vehicle); and

- $4,350 for May living expenses including food, health insurance and ongoing medical bills.

The Bank filed a Limited Objection on April 1, 2021, in which it stated: "The Bank consents to the Debtor's use of $68,335.70 of cash collateral held in Sirios Land and Cattle Cash Collateral Account." (Docket #115, ¶ 2). At a status conference on April 7, 2021, counsel for the Bank represented the Bank consented to the use of $68,335.70 of cash collateral. Based on that representation, the Court vacated the hearing set for April 8, 2021 (docket #134), anticipating the parties would submit an agreed-upon interim cash collateral order. But, the Bank subsequently refused to agree to Debtors' use of cash collateral and would not agree to an order. The Bank also refused to approve payment of $5,700, representing 50% of the cost of a survey required to close the pending sale of a parcel of the Farm at a price of $2,850,000. Debtors filed a Supplement to the pending Cash Collateral Motion and requested an emergency hearing for interim use of cash (docket #149).

At the emergency hearing, the Bank's counsel complained that others should not be paid ahead of the Bank, even those with statutory priority over the Bank's lien, such as the real property taxes. The Bank argued Debtors should allow the property taxes to become delinquent, regardless of any interest or fees that would be charged by the taxing authority. The Bank argued the Debtors did not need to spend money on insurance because the real estate would eventually be sold. The Bank also argued Debtors did not need to spend money for fertilizer, fuel, or irrigation because "nature would take over." The Court approved the Debtors' interim use of cash collateral, specifically including fertilizer for the wheat crop, real property taxes due April 30th, and the surveyor expenses, finding the Bank's opposition to be "mystifying." The Court then set the matter for final hearing, to be held May 6, 2020. Prior to the final hearing, the Bank agreed to Debtors' use of cash collateral, and the parties filed a stipulation with the Court.

For the work described above, the Law Firm spent 31.60 hours, at a cost of $14,653.00. The Court cannot find that amount to be reasonable. The Bank did not have a substantive objection to Debtors' use of cash collateral. It could have reached the same stipulations it eventually reached without the expense of the Court hearings. It certainly did not need two partner-level attorneys to prepare for and participate in hearings at which no substantive objection was pursued. The Law Firm's pursuit of objections before reaching stipulations did not protect the Bank's collateral; their only effect was to increase fees of the Bank's counsel and Debtors' counsel in responding to the objections.

The Court's determination of the amount reasonably expended on this matter is set forth below:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
10/12/2020	Nissly, Anita L. (time treated separately)	Draft Entry of Appearance for both bankruptcy cases (.4); finalize Entries of Appearance for filing with the court (.1); continue drafting Proof of Claim			

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		(.5); draft Motion to Prohibit Use of Cash Collateral (.2).			
		cash collateral work: draft Motion to Prohibit Use of Cash Collateral (.2).	0.20	$200.00	$40.00
10/13/2020	O'Brien, John A. (time treated separately)	Review Debtors Motion to Approve Retainer and related notice in both cases (.3); telephone conversation with Cara, Dale, and Tyler (.4); memos from and to the title company regarding automatic stay (.1); follow up with Public Trustee regarding automatic stay (.1); draft Two Motion to Prohibit Use of Cash Collateral and proposed orders (.9); memo to Debtor's counsel regarding collateral inspection (.1); memo to Debtor's counsel regarding State Court suggestion of Bankruptcy (.1); telephone conversation with Mr. Morrow regarding information needed for Proof of Claim (.1); review Notices of Reassignment of Judge and update file accordingly (.1); closer review of Bankruptcy petition for incorrect state of liabilities and Creditors Matrix (.2); review applications to employ counsel and related statements and notices in both cases (.3).			
		cash collateral work: draft Two Motion to Prohibit Use of Cash Collateral and proposed orders (.9)	0.90	$515.00	$463.50
10/13/2020	Nissly, Anita L. (time treated separately)	Work on invoice for attachment to proof of claim (.8); continue drafting Motion to Prohibit Use of Cash Collateral (.1); draft proposed order granting same (.2); email to public trustee (.1); draft Motion to Prohibit Use of Cash Collateral and proposed order for second bankruptcy case (.3); email from client (.1); email from public trustee (.1); continue drafting proof of claim (.1).			
		cash collateral work: continue drafting Motion to Prohibit Use of Cash Collateral (.1); draft	0.60	$200.00	$120.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		proposed order granting same (.2); draft Motion to Prohibit Use of Cash Collateral and proposed order for second bankruptcy case (.3)			
10/26/2020	O'Brien, John A.	Memos from and to Debtor's counsel regarding inspections and cash collateral inspection (.1); memos to and from Cara regarding same (.1); telephone conversation with Mr. Brown and Mr. Morrow regarding inspection (.2); brief review of Debtor's Statements and Schedules (.5); memos to and from Debtor's counsel regarding conditions to use cash collateral (.2).	1.10	$515.00	$566.50
10/27/2020	O'Brien, John A.	Review memos from Debtor's counsel regarding cash collateral (.2); memos to Cara regarding same (.1); review memo from Court Clerk regarding cash collateral (.1).	0.40	$515.00	$206.00
10/29/2020	Nissly, Anita L.	Draft Witness and Exhibit List (.6); compile and label exhibits for hearing (.4); review court filings and docket deadlines accordingly (.2).	1.20	$200.00	$240.00
10/29/2020	Sandberg, Scott C.	Review court filings, client documents and related matters in preparation for emergency cash collateral hearing (3.0); prepare objection to expedited motion for use of cash collateral (.3).	3.30	$440.00	$1,452.00
	(reduction)	remove work duplicating that of another attorney	(3.30)	$440.00	($1,452.00)
10/29/2020	O'Brien, John A.	Telephone conversation with Mr. Brown regarding equipment inspection and appraisal (.2); memos to and from Cara and Tyler regarding cash collateral and inspection issues (.2); review Chapter 12 Trustee's objection to Motion to Employ Retainer and counsel (.1); review Sirios Land Statements and Schedules and Sirios Statements and Schedules and identify inaccuracies and inconsistencies (.8); review order and Notice of Cash Collateral hearing (.1); telephone conversation with	1.90	$515.00	$978.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Cara (no charge); work on Response to Motion to Use Cash Collateral (.5).			
	(time treated separately)	remove general bankruptcy work: review Chapter 12 Trustee's objection to Motion to Employ Retainer and counsel (.1); review Sirios Land Statements and Schedules and Sirios Statements and Schedules and identify inaccuracies and inconsistencies (.8)	(0.90)	$515.00	($463.50)
10/30/2020	O'Brien, John A.	Telephone conversation with Mr. Brown regarding Equipment Values (.1); assemble documentation for Proof of Claim and calculate total proof of claim amount (.5); telephone conversation with Cara and Ty regarding conversation with Bucker and Bank's partial consent to the use cash collateral (.3); closer review of Borrower's Motion to Use Cash Collateral and analysis of budget (1.7); brief legal research regarding requirements for an emergency cash collateral hearing (.2); draft Response to Motion to Use Cash Collateral (1.1); review real estate appraisal and compare to Debtor's stated value (.3); review Bank's loan file for loan history with the Debtor (.4).	4.60	$515.00	$2,369.00
10/31/2020	O'Brien, John A.	Review order granting Trustee extension of time (.1); review valuation and equipment condition information from Mr. Brown (.1).	0.20	$515.00	$103.00
11/2/2020	Sandberg, Scott C.	Prepare for and attend hearing re cash collateral order; review court filings re same; (1.6).	1.60	$440.00	$704.00
	(reduction)	remove work duplicating that of another attorney	(1.60)	$440.00	($704.00)
11/2/2020	O'Brien, John A.	Prepare for and attend Cash Collateral hearing (2.9); telephone conversation with Mr. Hepner regarding Cash Collateral issues (.1); memo to Cara regarding same (.1); review and respond to Debtor's budget (.1); telephone	4.20	$515.00	$2,163.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		conversation with Dale and Tyson (no charge); memo to Debtor's counsel regarding check cashing logistics and Cash Collateral account (.2); memos to Cara and Tanner regarding cash collateral; deposit account and Ranch Sale activities (.3); memos to and from Debtor's counsel regarding scheduling examination (.1); begin preparing for BR 2004 examinations (.4).			
	(time treated separately)	remove 2004 examination work: memos to and from Debtor's counsel regarding scheduling examination (.1); begin preparing for BR 2004 examinations (.4).	(0.50)	$515.00	($257.50)
11/3/2020	Sandberg, Scott C.	Review correspondence re cash collateral accounts (.2).	0.20	$440.00	$88.00
	(reduction)	remove work duplicating that of another attorney	(0.20)	$440.00	($88.00)
11/3/2020	O'Brien, John A. (time treated separately)	Memo to Debtor's counsel regarding examination scheduling (.1); memo to Debtor's counsel regarding protecting cash collateral (.1); memos to and from Cara, Dale and Tyler regarding status of filings and communications with Debtor's counsel (.2); review Order Authorizing Use of Cash Collateral and minutes of the proceeding (.1); continue assembling document for proof of claim (.6); memo to Debtor's counsel regarding suggestion of Bankruptcy (.1); memos from and to Debtor's counsel regarding protection cash collateral (.2).			
		cash collateral work: memo to Debtor's counsel regarding protecting cash collateral (.1); review Order Authorizing Use of Cash Collateral and minutes of the proceeding (.1); memos from and to Debtor's counsel regarding protection cash collateral (.2).	0.40	$515.00	$206.00
11/17/2020	O'Brien, John A. (time treated	Legal research on P question raised by the chapter 12 Trustee (1.2); memos to and			

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
	separately)	from the chapter 12 Trustee regarding same (.3); draft exhibit and witness list for cash collateral hearing and assemble exhibits for hearing (1.4); draft Cara's direct examination for the hearing (1.4); memos to and from Car and Tanner regarding examination and cash collateral hearing (.3); prepare for cash collateral hearing (.8); prepare examination exhibits (.2); prepare for Debtor's examination (.7); telephone conference with Cara and Tanner (no charge).			
		cash collateral work: draft exhibit and witness list for cash collateral hearing and assemble exhibits for hearing (1.4); draft Cara's direct examination for the hearing (1.4); memos to and from Car and Tanner regarding examination and cash collateral hearing (.3); prepare for cash collateral hearing (.8); prepare examination exhibits (.2); prepare for Debtor's examination (.7); telephone conference with Cara and Tanner (no charge).	4.80	$515.00	$2,472.00
11/19/2020	O'Brien, John A. (time treated separately)	Review and organize notes of examination (.6); telephone conference with Cara regarding cash collateral hearing status (no charge); memos from and to Trustee regarding cash collateral hearing (.1); memos from and to court clerk regarding hearing (.1); memo to Debtor's counsel regarding tax returns (.1); closer review of documents produced by Debtor (.3); prepare for and attend cash collateral hearing (.9); memos from Debtor's counsel regarding deposition exhibits and tax refunds (.2); review debtor's 2019 tax returns (.3); memo to Cara regarding same (.1).			
		cash collateral work: telephone conference with Cara regarding	1.10	$515.00	$566.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		cash collateral hearing status (no charge); memos from and to Trustee regarding cash collateral hearing (.1); memos from and to court clerk regarding hearing (.1); prepare for and attend cash collateral hearing (.9)			
11/20/2020	O'Brien, John A. (time treated separately)	Memo to Chapter 12 Trustee regarding discrepancy in Debtor's testimony (.1); memo to Bank regarding same (.1); review proposed cash collateral order (.1); memos from and to Debtor's counsel (.1); review Debtor's Chapter 12 Trustee reports and memo to client regarding same (.2); review memo from Chapter 12 Trustee regarding cash collateral (.1).			
		cash collateral work: review proposed cash collateral order (.1); memos from and to Debtor's counsel (.1); review memo from Chapter 12 Trustee regarding cash collateral (.1).	0.30	$515.00	$154.50
11/22/2020	O'Brien, John A.	Review memo from Debtor's counsel to court clerk and memo to Cara (.1).	0.10	$515.00	$51.50
11/23/2020	O'Brien, John A.	Review final and entered Stipulated Order for Use of Cash Collateral (.1).	0.10	$515.00	$51.50
3/31/2021	Nissly, Anita L.	Begin drafting Objection to Motion (.2).	0.20	$220.00	$44.00
4/1/2021	O'Brien, John A. (time treated separately)	Memos from and to Cara regarding land sale response (.2); review Trustee objection to Chapter 12 Plan (.2); review Debtor's second motion to use cash collateral (.4); draft objection to Debtor's second motion to use cash collateral (.5); review memo from Debtor's counsel and Owen's contract extension (.1); prepare for and attend preliminary hearing motion to approve 4th sale motion (1.0); telephone conference with Chapter 12 Trustee (.1); draft motion for relief from stay (1.8); memos from and to Cara (.1).			
		cash collateral objection work: draft objection to Debtor's	0.50	$535.00	$267.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		second motion to use cash collateral (.5)			
4/1/2021	Nissly, Anita L.	Continue drafting Objection (.9); continue drafting Motion For Relief From Stay (1.2); email from client (.1); finalize Objection for filing with the court (.1); continue drafting Notice of Motion For Relief From Stay (.1); work on compiling and labeling exhibits (.6).	3.00	$220.00	$660.00
	(time treated separately)	remove relief from stay work: continue drafting Motion For Relief From Stay (1.2); continue drafting Notice of Motion For Relief From Stay (.1); work on compiling and labeling exhibits (.6).	(1.90)	$220.00	($418.00)
4/26/2021	O'Brien, John A. (time treated separately)	Review memo from and to title company and settlement sheet on 4th closing (.1); memos to and from Cara regarding same (.1); telephone conference with Cara regarding cash collateral and preliminary hearing (.1); review Debtor's motion for corrected sale order and entered order (.1); review Debtor's Emergency and Supplemented Order to Use Cash Collateral (.9); analysis of Debtor's cash collateral needs and draft response to emergency motion (1.9); review order setting hearing on Motion (.1).			
		work on cash collateral objection: telephone conference with Cara regarding cash collateral and preliminary hearing (.1); review Debtor's Emergency and Supplemented Order to Use Cash Collateral (.9); analysis of Debtor's cash collateral needs and draft response to emergency motion (1.9); review order setting hearing on Motion (.1).	3.00	$535.00	$1,605.00
4/26/2021	Nissly, Anita L.	Draft Response to Supplement to Second Motion Authorizing Use of Cash Collateral (.6); compile and label exhibit to same (.2); finalize same and efile same with the court (.1);	1.00	$220.00	$220.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		email to client regarding same (.1).			
		All time entries above:	**34.90**		**$15,792.00**
		Time treated separately (in other categories):	**(3.30)**		**($1,139.00)**
		Amount sought in this category:	**31.60**		**$14,653.00**
		Amount not shown to be reasonable:	**(5.10)**		**($2,244.00)**
		Subtotal:	**26.50**		**$12,409.00**
		75% reduction:	**(19.88)**		**($9,306.75)**
		Remaining amount:	**6.63**		**$3,102.25**

The Court finds the time sought to be excessive and a 75% reduction to be appropriate, with the remaining amount, 6.63 hours, reasonably expended on this matter had the Bank negotiated stipulated orders without filing and pursuing objections for objections' sake. The Court finds each timekeeper's hourly rate to be reasonable. Accordingly, the Court finds the total of $3,102.25 to be a reasonable lodestar amount for this matter.

H. Exemption Objections

On December 7, 2020, the Bank filed Objections to Debtor's Claim of Exemptions (docket ##50, 52, and 54). The Objections disputed Debtors' exemptions in their homestead and farm equipment. The Objections were without merit. After Debtors filed a Response (Docket #57), the Bank did not further prosecute its Objections. The Objections did not help the Bank protect its collateral. Their only effect was to increase fees of the Bank's counsel and Debtors' counsel in responding to the Objections.

The Law Firm spent the following amount of time on this matter:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
12/4/2020	O'Brien, John A.	Review Debtor's claims of exemptions which are improper (.2); memo to Cora re same (.1); memo to Debtor's counsel and Chapter 12 Trustee regarding sales efforts (.1); memo to Cara regarding same (.1)	0.50	$515.00	$257.50
12/4/2020	Nissly, Anita L.	Draft Objection to Claim of Exemption (.2); draft Notice re Objection to Claim of Exemption (.3).	0.30	$200.00	$60.00
12/6/2020	O'Brien, John A.	review Debtor's claims to exemption and deadline for objection (.2); review Bank's Deed of Trust for homestead waiver (.1); draft objection to claim of exemption and related notice (.3).	0.60	$515.00	$309.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
12/7/2020	O'Brien, John A.	Finalize Objection to Claim of Exemption and related Notice (.2); memos from and to Debtor's counsel (.1).	0.30	$515.00	$154.50
12/9/2020	O'Brien, John A. (time treated separately)	Memos to and from Realtor, Debtor's counsel and Chapter 12 Trustee regarding scheduling (.1); memos to Cora regarding same and status (.1); telephone conference with Cora regarding status report (no charge); review information concerning the Debtor's purchase of farm equipment and the Bank's PMSI (.4); draft Objection to Farm Equipment Exemption and related Notice (.5).			
		objection to exemption work: review information concerning the Debtor's purchase of farm equipment and the Bank's PMSI (.4); draft Objection to Farm Equipment Exemption and related Notice (.5).	0.90	$515.00	$463.50
1/1/2021	O'Brien, John A.	Review Debtor's resistance to Bank's Objection to exemptions (.1).	0.10	$535.00	$53.50
		Amount sought in this category:	**2.70**		**$1,298.00**
		Amount not shown to be reasonable:	**(2.70)**		**($1,298.00)**
		Remaining amount:	**0.00**		**$0.00**

The Court finds all time spent on this matter to have been unnecessary and unreasonable. Accordingly, the Court finds the total of $0 to be a reasonable lodestar amount for this matter.

I. Motion for Relief from Stay

On April 3, 2021, the Bank filed a Motion for Relief from Stay (Docket #118). The Motion requested immediate relief from stay for undefined "surplus" cash collateral and prospective relief from stay after 11 months for all other collateral. This prospective relief from stay was based on the allegation the Bank "may or will go from over secured to under secured" after 11 months. The motion was not well supported in fact, as the Bank had not obtained evidence the value of its collateral had declined or was subject to decline. The motion was not well supported in law, without citation to authority for granting relief from stay in the absence of currently existing cause for such relief. The Court summarily denied the motion at a preliminary hearing on April 27, 2021 (docket #157). The motion did not help the Bank protect its collateral. Its only effect was to increase fees of the Bank's counsel and Debtors' counsel in responding to the motion.

The Law Firm spent the following amount of time on this matter:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
1/27/2021	Nissly, Anita L.	Begin work on Motion For Relief From Stay.	0.20	$220.00	$44.00
1/27/2021	O'Brien, John A. (time treated separately)	Memos from and to Chapter 7 Trustee regarding plan (.1); memos to and from Cara regarding status (.1); memo to Debtor's counsel (.1); review memo from Debtor's counsel regarding Sales Contracts (.1); review Lyons Sales Contract (.4); review Westberg Sales Contract (.4); memo to Cara regarding contracts (.1); begin Drafting motion for Relief from Stay regarding Sales Contracts (.3).			
		relief from stay work: begin Drafting motion for Relief from Stay regarding Sales Contracts (.3).	0.30	$535.00	$160.50
1/28/2021	Nissly, Anita L.	Continue drafting Motion For Relief From Stay (1.6); begin drafting Notice of Motion For Relief From Stay (.2); begin drafting proposed Order Granting Motion For Relief From Stay (.1).	1.90	$220.00	$418.00
2/1/2021	Nissly, Anita L.	Email from client (.1); review payment history (.1); compile and label exhibits to Motion For Relief From Stay (.4).	0.60	$220.00	$132.00
2/2/2021	Nissly, Anita L.	Continue to compile and label exhibits to Motion For Relief From Stay (.2).	0.20	$220.00	$44.00
4/1/2021	O'Brien, John A. (time treated separately)	Memos from and to Cara regarding land sale response (.2); review Trustee objection to Chapter 12 Plan (.2); review Debtor's second motion to use cash collateral (.4); draft objection to Debtor's second motion to use cash collateral (.5); review memo from Debtor's counsel and Owen's contract extension (.1); prepare for and attend preliminary hearing motion to approve 4th sale motion (1.0); telephone conference with Chapter 12 Trustee (.1); draft motion for relief from stay (1.8); memos from and to Cara (.1).			

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		relief from stay work: draft motion for relief from stay (1.8)	1.80	$535.00	$963.00
4/1/2021	Nissly, Anita L.	Continue drafting Objection (.9); continue drafting Motion For Relief From Stay (1.2); email from client (.1); finalize Objection for filing with the court (.1); continue drafting Notice of Motion For Relief From Stay (.1); work on compiling and labeling exhibits (.6).			
		relief from stay work: continue drafting Motion For Relief From Stay (1.2); continue drafting Notice of Motion For Relief From Stay (.1); work on compiling and labeling exhibits (.6).	1.90	$220.00	$418.00
4/2/2021	O'Brien, John A.	Finalize Motion for Relief from Stay, Notice of Hearing and Proposed Order (1.2); telephone conference with Cara (no charge).	1.20	$535.00	$642.00
4/18/2021	O'Brien, John A. (time treated separately)	Compare Debtors stated expenses to CSU stated average expenses (.3); review Debtor's Objection to Bank claim and research same (.3); memo to Debtor's counsel (.1); review Debtor's monthly financial reports for available cash and request to use more cash collateral (.2); memo to Cara regarding same (.1); review Debtor's Stay Relief Stipulation with Santander and refusal of some terms with Bankwest (.2); review Court's Minute Order setting deadlines and hearings on all pending matters (.1); review and identify errors in Debtor's newest cash flow projection dated April 15, 2021 (.3); closer review of Sales Contract for 5th sale and address broken pivot issue (.2); memo to Debtor's counsel regarding same (.1); review Debtor's most recent plan dated April 14 and memo to Cara regarding same (.6); begin drafting objection to April 14 plan (.2); begin preparing exhibits and witness list for			

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		preliminary hearing on Motion for Relief from Stay (.3); review Debtor's proposed cash collateral stipulation (.3); memo to Debtor's counsel regarding same (.1).			
		relief from stay work: begin preparing exhibits and witness list for preliminary hearing on Motion for Relief from Stay (.3)	0.30	$535.00	$160.50
4/19/2021	Nissly, Anita L.	Draft Witness and Exhibit List for April 27, 2021 preliminary hearing (.7); begin drafting Objection to Debtors' Amended Plan (.2).	0.90	$220.00	$154.00
	(time treated separately)	remove work on plan confirmation: begin drafting Objection to Debtors' Amended Plan (.2).	(0.20)	$220.00	($44.00)
4/23/2021	O'Brien, John A. (time treated separately)	Review memo from title company regarding 4th closing settlement sheet (.2); work on Exhibit and witness list for motion for relief from stay (.4).			
		relief from stay work: work on Exhibit and witness list for motion for relief from stay (.4).	0.40	$535.00	$214.00
4/23/2021	Nissly, Anita L.	Continue drafting Witness and Exhibit List (.6); work on exhibits (.3).	0.90	$220.00	$198.00
4/24/2021	Nissly, Anita L.	Finalize Witness and Exhibit list for filing with the court; efiling of same; set up sharefile folder; email to G. Humphries regarding hearing exhibits; email to client regarding same; email to client regarding court filing.	0.70	$220.00	$154.00
4/27/2021	O'Brien, John A.	Prepare for and attend hearing on 2.1 motion for relief from stay and cash collateral (2.0); telephone conference with Cara regarding same (.1).	2.10	$535.00	$1,123.50
		All time entries above:	**13.40**		**$4,825.50**
		Time treated separately (in other categories):	**(0.20)**		**($44.00)**
		Amount sought in this category:	**13.20**		**$4,781.50**
		Amount not shown to be reasonable:	**(13.20)**		**($4,781.50)**
		Remaining amount:	**0.00**		**$0.00**

The Court finds all time spent on this matter to have been unnecessary and unreasonable. Accordingly, the Court finds the total of $0 to be a reasonable lodestar amount for this matter.

J. Property Sale Objections

Prior to plan confirmation, Debtors filed several Motions to sell parcels of the Farm, with proceeds to be paid to the Bank (docket ##76, 85, & 128). The Bank filed "Limited" objections to two of these motions (docket ##87 & 108). The Bank's Objections sought relief beyond the scope of Debtors' Motions and were of such dubious merit that at a hearing on April 27, 2021, the Court questioned whether the Bank wanted the sales to go forward. The objections did not help the Bank protect its collateral. Their only effect was to increase fees of the Bank's counsel and Debtors' counsel in responding to the objections.

The Law Firm spent the following amount of time on this matter:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
2/24/2021	O'Brien, John A. (time treated separately)	Review Debtor's Motion to Sell Property by 3 contracts (.4); telephone conference with Chapter 12 Trustee (.1); memo to Debtor's counsel regarding try to settle sales objection (.1); draft limited objection to sales motion (.9).			
		work on objection to sale: draft limited objection to sales motion (.9).	0.90	$535.00	$481.50
2/25/2021	O'Brien, John A. (time treated separately)	Finalize Limited Objection to Sale Motion (.4); memos from and to Debtor's counsel regarding trying to resolve sale objection (.2); review Owen contract (.2); memos to Cara regarding new contract and sale motion (.2); telephone conference with Chapter 12 Trustee (.1).			
		work on objection to sale: Finalize Limited Objection to Sale Motion (.4)	0.40	$535.00	$214.00
3/22/2021	O'Brien, John A. (time treated separately)	Analysis of Debtor's financial plan and budget to set aside $40,000 and identify duplicate expenditure (.1); review Debtor's motion to sell property (.3); review amended motion to sell property and related notice (.3); draft objection (.8).			
		work on objection to sale: draft objection (.8).	0.80	$535.00	$428.00

4/1/2021	O'Brien, John A. (time treated separately)	Memos from and to Cara regarding land sale response (.2); review Trustee objection to Chapter 12 Plan (.2); review Debtor's second motion to use cash collateral (.4); draft objection to Debtor's second motion to use cash collateral (.5); review memo from Debtor's counsel and Owen's contract extension (.1); prepare for and attend preliminary hearing motion to approve 4th sale motion (1.0); telephone conference with Chapter 12 Trustee (.1); draft motion for relief from stay (1.8); memos from and to Cara (.1).			
		work on objection to sale: prepare for and attend preliminary hearing motion to approve 4th sale motion (1.0)	1.00	$535.00	$535.00
		Amount sought in this category:	**3.10**		**$1,658.50**
		Amount not shown to be reasonable:	**(3.10)**		**($1,658.50)**
		Remaining amount:	**0.00**		**$0.00**

The Court finds all time spent on this matter to have been unnecessary and unreasonable. Accordingly, the Court finds the total of $0 to be a reasonable lodestar amount for this matter.

K. Amendment/Objection to Bank's Proof of Claim

Debtors filed their bankruptcy petitions on October 9, 2020. When the Bank filed its proof of claim, it calculated interest through October 12, 2020. That calculation was incorrect. Debtors' counsel alerted the Law Firm of the error, but the Bank did not correct its proof of claim until Debtors filed an objection to it. The Court finds the time spent responding to Debtors' objection and the time spent correcting the proof of claim should not be charged to the Debtors.

The Law Firm spent the following amount of time on this matter:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
3/19/2021	Nissly, Anita L. (time treated separately)	Email to client regarding payoffs (.1); begin drafting Amended Proofs of Claims (.4).			
		work on claim amendment: begin drafting Amended Proofs of Claims (.4).	0.40	$220.00	$88.00
3/23/2021	Nissly, Anita L.	Continue drafting Amended Proofs of Claim including	1.10	$220.00	$242.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		attachments (.6); finalize Amended Proofs of Claim for filing with the court (.3); work on correction to Amended Proofs of Claim (.2).			
3/23/2021	O'Brien, John A. (time treated separately)	Draft Amended Proof of Claim (.3); review memo from title company and settlement statement for closing number 3 (.2); memo to title company (.1).			
		work on claim amendment	0.30	$535.00	$160.50
4/18/2021	O'Brien, John A. (time treated separately)	Compare Debtors stated expenses to CSU stated average expenses (.3); review Debtor's Objection to Bank claim and research same (.3); memo to Debtor's counsel (.1); review Debtor's monthly financial reports for available cash and request to use more cash collateral (.2); memo to Cara regarding same (.1); review Debtor's Stay Relief Stipulation with Santander and refusal of some terms with Bankwest (.2); review Court's Minute Order setting deadlines and hearings on all pending matters (.1); review and identify errors in Debtor's newest cash flow projection dated April 15, 2021 (.3); closer review of Sales Contract for 5th sale and address broken pivot issue (.2); memo to Debtor's counsel regarding same (.1); review Debtor's most recent plan dated April 14 and memo to Cara regarding same (.6); begin drafting objection to April 14 plan (.2); begin preparing exhibits and witness list for preliminary hearing on Motion for Relief from Stay (.3); review Debtor's proposed cash collateral stipulation (.3); memo to Debtor's counsel regarding same (.1).			
		work on objection to proof of claim: review Debtor's Objection to Bank claim and research same (.3); memo to Debtor's counsel (.1)	0.40	$535.00	$214.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
5/7/2021	O'Brien, John A. (time treated separately)	Review newest revised easement (.2); memo to Debtor's counsel and Chapter 12 Trustee regarding same (.1); review application to extend listing period and order granting application (.3); review verified statement or Davig (.1); review two exclusions of the Magnum Contract (.3); review version 5 of the Easement and memo to Debtor's counsel regarding same (.4); review Debtor's most recent Plan (1.2); review Debtor's Amended Plan dated April 14 (.9); draft objections to Debtor's most recent plan (1.2); review Debtor's objection to claim - $350,000 Note interest rate (.4); analyze Debtor's objection and telephone conference with Cara regarding same (.5); draft response to claim objection (.4); review Debtor's and Magnum's proposed revisions to subordination agreement and revise subordination agreement (.8).			
		work on objection to Bank's proof of claim: review Debtor's objection to claim - $350,000 Note interest rate (.4); analyze Debtor's objection and telephone conference with Cara regarding same (.5); draft response to claim objection (.4)	1.30	$535.00	$695.50
5/7/2021	Nissly, Anita L. (time treated separately)	Draft Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) (.5); revisions to Subordination Agreement (.3); finalize Subordination Agreement (.1); email to G. Humphries and D. Hepner regarding same (.1); email to client regarding same (.1); finalize Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) for filing with the court			

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		(.1); continue drafting Objection to Motion to Approve Plan (.5)			
		work on objection to Bank's proof of claim: Draft Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) (.5); finalize Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) for filing with the court (.1);	0.60	$220.00	$132.00
5/14/2021	O'Brien, John A.	Telephone conference with Cara regarding settlement options (.2); telephone conference with Mr. Hepner regarding settlement options and plan issues (1.2) review pendency interest and 506(b) issues (.9); review legal authority Trustee provided on interest rates (.5); memo to Trustee regarding Trustee's authority (.2); review legal authorities on pendency interest, 506(b) and remaining contested issues and compromise memo to Debtor's counsel regarding same (1.6).	4.60	$535.00	$2,461.00
		Amount sought in this category:	**8.70**		**$3,993.00**
		Amount not shown to be reasonable:	**(8.70)**		**($3,993.00)**
		Remaining amount:	**0.00**		**$0.00**

The Court finds all time spent on this matter to have been caused by an error of the Bank and/or the Law Firm, and it is not reasonably charged to Debtors. Accordingly, the Court finds the total of $0 to be a reasonable lodestar amount for this matter.

L. Plan Confirmation Objections

Debtors filed their Chapter 12 Plan on January 7, 2021 (docket #62). As they had represented, their plan was a 100% plan, providing for the sale of the Farm in separate parcels and the payment of all allowed claims from sales proceeds. The Bank filed an objection to confirmation (docket #74), stating it was "not opposed to a more specific and workable plan," and requesting Debtors revise their plan to add (1) an auction deadline, (2) auction details as requested by the Chapter 12 Trustee, (3) clarification of the interest rate on each loan, (4) a correction of the payoff amount due to the Bank (based on the

amounts listed in the Bank's proof of claim), (5) a provision for relief from stay in the event the Farm was not sold by a date certain, and other miscellaneous provisions, including specification of the use of sale proceeds, addressing a "surplus" of cash collateral in Debtors' possession, and adding a provision requiring "bona fide" sales (*i.e.*, not lower prices than fair market value).

In response, Debtors filed their Joint Amended Chapter 12 Plan of Reorganization Dated March 15, 2021 (the "March 15 Plan," docket #102). In their March 15 Plan, Debtors (1) set an auction deadline, (2) added auction details, (3) clarified the interest rate on each loan as the contract rate, (4) addressed the correct payoff amount due to the Bank (the Bank's proof of claim erroneously included post-petition interest in its pre-petition amounts), and (5) included the same provision for relief from stay (upon default and notice of default, not upon a date certain) as in the prior plan. Debtors also included provisions specifying the use of sale proceeds, providing for a payment of $50,000 of "surplus" cash collateral to the Bank, and agreeing property would not be sold at less than 85% of appraised value without consent of the Bank and the Trustee.

The Bank filed an objection to confirmation of the March 15 Plan (docket #114), insisting on a date certain for relief from stay. Most of the Bank's objection appeared to have been copied from its prior objection and did not address the changes Debtors had already included in their March 15 Plan. The Bank further insisted Debtors be required to attribute their bankruptcy filing to the loss of the custom farming contract with Denver Metro Wastewater Reclamation District, rather than to the Bank's aggressive collection efforts. The Trustee also filed an objection to confirmation, asking the Plan be revised to provide for the Trustee's sole discretion as to the terms and conditions of the auction.

In response, Debtors filed their Joint Amended Chapter 12 Plan of Reorganization Dated April 14, 2021 (the "April 14 Plan," docket #136), which addressed most of the Trustee's concerns (although the Trustee required additional provisions and corrections by objection filed May 11, 2021 (docket #180)). The Bank filed an objection to confirmation of the April 14 Plan (docket #171), acknowledging its agreement to the plan deadlines (without a specific deadline for relief from stay), but arguing for the application of the default interest rate after plan confirmation, asking for payment of more of the "surplus" cash collateral, and continuing to insist the Debtors change the reason for filing from the Bank's collection efforts to the loss of the custom farming contract. Much of the Bank's objection appeared to have been copied from prior objections.

Debtors filed a corrected version of the April 14 Plan on May 21, 2021 (docket #191). The April 14 Plan, as corrected, was confirmed by Order entered May 24, 2021 (docket #196). The April 14 Plan pays 100% to all allowed claims, including the Bank Claims, and pays the Bank a higher interest rate from the Petition Date to the Effective Date.

The Court finds the Bank's Objections to confirmation needlessly complicated and delayed confirmation of Debtors' Chapter 12 plan. To the extent the Bank had valid

concerns with the plan provisions,[10] the Law Firm could have addressed those through negotiation rather than confirmation objections. The Court specifically finds the time spent preparing for an evidentiary confirmation hearing, when no real objection to confirmation was being pursued, to be unreasonable.

The Law Firm spent the following amount of time pursuing objections to Debtors' plans:

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
1/19/2021	Sandberg, Scott C.	Telephone conference with J. O'Brien re plan objection issues; review court filings re same.	0.20	$475.00	$95.00
1/20/2021	Sandberg, Scott C.	Review court filings.	0.20	$475.00	$95.00
2/3/2021	Nissly, Anita L.	Begin drafting Objection to Motion to Approve Chapter 12 Plan (.3).	0.20	$220.00	$44.00
2/3/2021	O'Brien, John A.	Telephone conference with Chapter 12 Trustee regarding plan objections (.6); begin drafting acceptable plan terms and objections to plan (.3); telephone conference with Cara regarding Chapter 12 Trustee's comments on the plan (.1).	1.00	$535.00	$535.00
2/7/2021	O'Brien, John A.	Telephone conference with Chapter 12 Trustee regarding plan objections, no objections to real estate sale under pending contracts, confirmation hearing (.6); work on objection to plan (.3).	0.90	$535.00	$481.50
2/8/2021	Sandberg, Scott C.	Review correspondence re objection to plan.	0.20	$475.00	$95.00
2/10/2021	Sandberg, Scott C.	Research re client confirmation standards (.2); prepare correspondence re same (.2).	3.40	$475.00	$1,615.00
2/11/2021	Nissly, Anita L.	Continue drafting Objection to Plan (1.2).	1.20	$220.00	$264.00
2/12/2021	Nissly, Anita L.	Continue drafting Objection to Motion to Approve Chapter 12 Plan (1.8); finalize Motion for filing with the court (.3); review court filings and docket deadlines accordingly (.1).	2.20	$220.00	$484.00
2/12/2021	O'Brien, John A.	Finalize Objection to Chapter 12 Plan (3.3); review legal authority Chapter 12 Trustee	3.80	$535.00	$2,033.00

[10] The Court does not find the Debtors' stated cause of bankruptcy filing to be a valid ground for objection.

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		cited (.3); review Trustee's Objection to Plan (.2).			
2/12/2021	Sandberg, Scott C.	Review court filings.	0.20	$475.00	$95.00
2/22/2021	O'Brien, John A.	Two telephone conferences with Chapter 12 Trustee (.2); review Order setting confirmation hearing and order vacating confirmation hearing (.1); review Chapter 12 Trustee reports for both Debtors (.3); prepare for and attend preliminary hearing on Motion to Approve Plan (1.0); telephone conference with Cara regarding hearing and probable amended plan (.2).	1.80	$535.00	$963.00
3/18/2021	Nissly, Anita L.	Begin drafting Objection to Motion to Approve Amended Chapter 12 Plan (.1); review court filings and docket deadlines accordingly (.1).	0.20	$220.00	$44.00
3/22/2021	Nissly, Anita L.	Draft Objection (1.1); finalize Objection and efile same with the court (.2); email to client regarding court filings (.1).	1.40	$220.00	$308.00
3/30/2021	O'Brien, John A.	Telephone conference with Chapter 12 Trustee (.1); closer review of Debtor's Amended Chapter 12 Plan and draft Objection to Amended Chapter 12 Plan.	4.60	$535.00	$2,461.00
3/30/2021	Nissly, Anita L.	Continue drafting Objection to Amended Plan (2.5); finalize same for filing with the court (.1).	2.60	$220.00	$572.00
4/7/2021	O'Brien, John A. (time treated separately)	Review Debtor's "corrected" Plan (.8); prepare for and attend preliminary confirmation hearing (1.5); telephone conference with Chapter 12 Trustee (.1); memos to and from Cara regarding remaining issues (.2); review memo from Debtor's counsel regarding land offer and memo to Craig regarding same (.1); review memo from Debtor's counsel regarding payoffs and memo to Cara regarding same (.1).			
		work on confirmation: prepare for and attend preliminary confirmation hearing (1.5)	1.50	$535.00	$802.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
4/18/2021	O'Brien, John A. (time treated separately)	Compare Debtors stated expenses to CSU stated average expenses (.3); review Debtor's Objection to Bank claim and research same (.3); memo to Debtor's counsel (.1); review Debtor's monthly financial reports for available cash and request to use more cash collateral (.2); memo to Cara regarding same (.1); review Debtor's Stay Relief Stipulation with Santander and refusal of some terms with Bankwest (.2); review Court's Minute Order setting deadlines and hearings on all pending matters (.1); review and identify errors in Debtor's newest cash flow projection dated April 15, 2021 (.3); closer review of Sales Contract for 5th sale and address broken pivot issue (.2); memo to Debtor's counsel regarding same (.1); review Debtor's most recent plan dated April 14 and memo to Cara regarding same (.6); begin drafting objection to April 14 plan (.2); begin preparing exhibits and witness list for preliminary hearing on Motion for Relief from Stay (.3); review Debtor's proposed cash collateral stipulation (.3); memo to Debtor's counsel regarding same (.1).			
		work on plan confirmation: begin drafting objection to April 14 plan (.2)	0.20	$535.00	$107.00
4/19/2021	Nissly, Anita L. (time treated separately)	Draft Witness and Exhibit List for April 27, 2021 preliminary hearing (.7); begin drafting Objection to Debtors' Amended Plan (.2).			
		work on plan confirmation: begin drafting Objection to Debtors' Amended Plan (.2).	0.20	$220.00	$44.00
5/3/2021	Sandberg, Scott C.	Prepare for confirmation hearing (.2).	0.20	$475.00	$95.00
5/6/2021	Sandberg, Scott C.	Review court filings related to plan and plan confirmation (.2).	0.20	$475.00	$95.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
5/7/2021	O'Brien, John A. (time treated separately)	Review newest revised easement (.2); memo to Debtor's counsel and Chapter 12 Trustee regarding same (.1); review application to extend listing period and order granting application (.3); review verified statement or Davig (.1); review two exclusions of the Magnum Contract (.3); review version 5 of the Easement and memo to Debtor's counsel regarding same (.4); review Debtor's most recent Plan (1.2); review Debtor's Amended Plan dated April 14 (.9); draft objections to Debtor's most recent plan (1.2); review Debtor's objection to claim - $350,000 Note interest rate (.4); analyze Debtor's objection and telephone conference with Cara regarding same (.5); draft response to claim objection (.4); review Debtor's and Magnum's proposed revisions to subordination agreement and revise subordination agreement (.8).			
		work on plan confirmation: draft objections to Debtor's most recent plan (1.2)	1.20	$535.00	$642.00
5/7/2021	Nissly, Anita L. (time treated separately)	Draft Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) (.5); revisions to Subordination Agreement (.3); finalize Subordination Agreement (.1); email to G. Humphries and D. Hepner regarding same (.1); email to client regarding same (.1); finalize Response to Debtors' Objection to Amended Claim No. 3 (Individual Case) and Amended Claim No. 1 (LLC Case) for filing with the court (.1); continue drafting Objection to Motion to Approve Plan (.5)			
		work on plan confirmation: continue drafting Objection to Motion to Approve Plan (.5)	0.50	$220.00	$110.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
5/10/2021	Sandberg, Scott C.	Review court filings on plan and plan confirmation (.7).	0.20	$475.00	$95.00
5/11/2021	Sandberg, Scott C.	Review court filings re confirmation hearing (.2).	0.20	$475.00	$95.00
5/13/2021	Sandberg, Scott C.	Review court filings re confirmation hearing (.2).	0.20	$475.00	$95.00
5/14/2021	Sandberg, Scott C.	Prepare for hearing (.3); email to client re same (.1).	0.40	$475.00	$190.00
5/16/2021	Sandberg, Scott C.	Review documents and filings re interest rate under debtors' plan (1.4).	1.40	$475.00	$665.00
5/17/2021	Sandberg, Scott C.	Email correspondence with client re confirmation hearing (.3); prepare briefs and outlines re same (2.9).	3.20	$475.00	$1,520.00
5/17/2021	Nissly, Anita L.	Compile documents for attorney hearing preparation binder (.5).	0.50	$220.00	$110.00
5/18/2021	Sandberg, Scott C.	Prepare argument and testimony outlines for hearing (5.2); telephone conference with trustee re plan (.2); review court filings on deadlines (.1).	5.50	$475.00	$2,612.50
5/18/2021	Nissly, Anita L.	Draft witness and exhibit list (.5); compile and label hearing exhibits (.5); work on hearing exhibit notebooks (.4); review court filings and docket deadlines accordingly (.1)	1.50	$220.00	$330.00
5/19/2021	Nissly, Anita L.	Draft Stipulation (1.8); continue compiling and labeling exhibits (1.0); continue drafting Witness and Exhibit List (.4); finalize Stipulation (.1); revisions to Stipulation (.2); email to G. Humphries and D. Hepner regarding Stipulation (.1); email to client regarding same (.1); finalize and efile Witness and Exhibit list (.2); draft list of hearing participants (.2); set up sharefile folder for transmission of exhibits (.2); email to chambers regarding witness list and list of participants (.1) ; email to client regarding same(.1); work on hearing exhibit notebooks (.5).	5.00	$220.00	$1,100.00
5/19/2021	O'Brien, John A. (time treated	Memos from and to Debtor's counsel regarding payoffs and payoff stipulation (.2); work on			

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
	separately)	Cara testimony (.2) memos from and to Cara regarding providing information Borrower requests, settlement, status and hearing preparation (.7); review memo from title company regarding closing (.1); work on Exhibit and witness list. (.1); telephone conference with Chapter 12 Trustee regarding Trustee's comments on stipulation (.2); review memo from Debtor's counsel regarding comments to stipulation (.1) revise stipulation (.4); telephone conference with Cara regarding stipulation (.2)			
		work on plan confirmation: work on Cara testimony (.2) memos from and to Cara regarding providing information Borrower requests, settlement, status and hearing preparation (.7); work on Exhibit and witness list. (.1);	0.90	$535.00	$481.50
5/19/2021	Sandberg, Scott C.	Continue preparing argument and testimony outlines for hearing (5.0); telephone conference with client re hearing preparation (.4); review correspondence re potential stipulation (.1).	5.50	$475.00	$2,612.50
5/20/2021	Nissly, Anita L.	Continue work on hearing exhibit notebooks (.2); emails to and from client regarding same (.1); download Debtors' exhibits (.1); work on Debtors' hearing exhibit notebooks for attorneys (.2); email to client regarding Stipulation (.1); finalize brief for filing with the court (.1).	0.80	$220.00	$176.00
5/20/2021	O'Brien, John A.	Memos to and from Debtor's counsel and Trustee regarding open issues and resolution (.9); memos from and to Cara regarding open issues (.8); closer review of Debtor's third version of the corrected plan (.8); telephone conference with Mr. Hepner regarding Trustee's objections	4.20	$535.00	$2,247.00

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		to most recent corrected plan (.3); telephone conference with Cara (.2); review final claim stipulation (.1); another telephone conference with Mr. Hepner regarding more corrections (.1); review fifth version of the corrected plan (.7) memos to Mr. Humphries regarding plan on stipulated order (.3)			
5/21/2021	O'Brien, John A.	Begin review of Debtor's hearing exhibits (.3); review order permitting conveyance of easement (.1); review Chapter 12 Trustee's exhibit and witness list (.1); review Procedure Order and memo to Debtor's counsel and Trustee regarding same (.1) telephone conference with Mr. Hepner regarding Trustee's newest changes to the newest corrected plan (.2) review Debtor's Sixth version of the corrected plan (.7); numerous memos from and to Debtor's counsel regarding more corrections to the corrected plan (.3); memos from and to Cara regarding status (.3); review proposed continuation order (.1); memos to Debtor's counsel, Chambers and Cara regarding same (.1); review Order Setting Hearing (.1).	2.40	$535.00	$1,284.00
5/22/2021	O'Brien, John A.	Review final plan filing with the court (.2); docket for plan items (.1); related preparation for confirmation hearing (.2).	0.50	$535.00	$267.50
5/24/2021	Sandberg, Scott C.	Review court filings and plan amendments (1.2); participate in confirmation telephone hearing with court (.1).	1.30	$475.00	$617.50
5/24/2021	O'Brien, John A.	Review minutes of proceeding and Confirmation Order (.1); final preparation for and attend confirmation hearing (.2); memos from and to Cara regarding Confirmation Order (.1); telephone conference with Cara (no charge); review Debtor's withdrawal of claimant (.1).	0.50	$535.00	$267.50

Work Date	Timekeeper	Narrative	Hours	Rate	Amount
		Amount sought in this category:	**62.30**		**$26,846.00**
		75% reduction	**(46.73)**		**($20,134.50)**
		Remaining amount:	**15.58**		**$6,711.50**

The Court finds the time sought to be excessive and a 75% reduction to be appropriate, with the remaining amount, 15.58 hours, reasonably expended on this matter had the Bank negotiated resolution of its valid concerns without filing and pursuing objections for objections' sake. The Court finds each timekeeper's hourly rate to be reasonable. Accordingly, the Court finds the total of $6,711.50 to be a reasonable lodestar amount for this matter.

M. Summary

As discussed above, the Court has determined a reasonable lodestar amount for each category as follows:

	Topic	Hours Sought	Reasonable Hours	Fees Sought	Reasonable Fees
A	Initial Review and Demand Letter	12.80	2.80	$5,080.00	$938.00
B	Research Re: Deed of Trust	3.60	3.60	$1,507.50	$1,507.50
C	Foreclosure Proceedings	30.50	10.80	$11,362.00	$3,357.00
D	Replevin/Receiver	43.40	21.60	$17,311.00	$8,635.50
E	Pre-Petition Negotiations	28.40	28.40	$13,303.00	$13,303.00
F	Bankruptcy General	120.60	59.40	$55,553.50	$27,357.75
G	Cash Collateral Objections	31.60	6.63	$14,653.00	$3,102.25
H	Exemption Objection	2.70	0.00	$1,298.00	$0.00
I	Relief From Stay	13.20	0.00	$4,781.50	$0.00
J	Property Sale Objections	3.10	0.00	$1,658.50	$0.00
K	Claim Amendment/Objection	8.70	0.00	$3,993.00	$0.00
L	Confirmation Objection	62.30	15.58	$26,846.00	$6,711.50
	Totals:	**360.90**	**148.81**	**$157,347.00**[11]	**$64,912.50**

IV. ADJUSTMENT OF LODESTAR AMOUNT

Once the Court has determined a lodestar amount, it may adjust the amount based on factors such as the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the experience, reputation, and ability of the lawyer or lawyers performing the services; and the fee customarily charged in the locality for similar legal services. *Home Loan Inv. v. St. Paul*

[11] The total considered by the Court does not match the total sought in the Bank's Motion. To the extent the error is that of the Court, it does not prejudice the Law Firm, as the Court has considered at least as much time as the Law Firm submitted.

Mercury Ins., 78 F. Supp.3d 1307, 1315 (D. Colo. 2014). Here, the Court finds no further adjustment necessary.

V. CONCLUSION

For the reasons discussed above, the Court will grant the Motion in part, to the extent the Bank is awarded its fees of $64,912.50, and costs of $3,674.09, and costs of receiver in the amount of $2,939.57.

Dated January 5, 2024

BY THE COURT:

Kimberley H. Tyson
United States Bankruptcy Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY J. KASSAS, *Plaintiff-Appellant*, v. STATE BAR OF CALIFORNIA, *Defendant-Appellee.*	No. 21-55900 D.C. Nos. 2:19-bk-24457-ER 2:21-ap-01021-ER OPINION

Appeal from the United States Bankruptcy Court
for the Central District of California
Ernest M. Robles, Bankruptcy Judge, Presiding

Argued and Submitted April 12, 2022
San Francisco, California

Filed August 1, 2022

Before: Jay S. Bybee and Ryan D. Nelson, Circuit Judges, and Jed S. Rakoff,[*] District Judge.

Opinion by Judge Bybee

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[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY[**]

Bankruptcy

The panel affirmed in part and reversed in part the bankruptcy court's judgment in an adversary proceeding in which the bankruptcy court found nondischargeable (1) indebtedness arising from a disbarred attorney's obligation to reimburse the State Bar for payments made by the Bar's Client Security Fund to victims of his misconduct and (2) the costs for the disciplinary proceedings conducted against the attorney, a Chapter 7 debtor.

Reversing in part, the panel held that the indebtedness arising from the attorney's obligation to reimburse the State Bar for the payments made to victims of his misconduct was not excepted from discharge under 11 U.S.C. § 523(a)(7), which provides that a debtor is not discharged from any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." Considering the totality of the Client Security Fund program, the panel concluded that any reimbursement to the Fund was payable to and for the benefit of the State Bar and was compensation for the Fund's actual pecuniary loss in compensating the victims for their actual pecuniary losses.

Affirming in part, the panel held that, pursuant to *In re Findley*, 593 F.3d 1048 (9th Cir. 2010), the costs associated

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

with the attorney's disciplinary proceedings were nondischargeable under § 523(a)(7).

COUNSEL

Matthew D. Resnik (argued) and M. Jonathan Hayes, Resnik Hayes Moradi LLP, Encino, California, for Plaintiff-Appellant.

Suzanne C. Grandt (argued), Vanessa L. Holton, and Robert G. Retana, Office of General Counsel, State Bar of California, San Francisco, California, for Defendant-Appellee.

OPINION

BYBEE, Circuit Judge:

Appellant Anthony J. Kassas, a Chapter 7 debtor, was disbarred by the California Supreme Court in 2014 for violations of the State Bar Rules of Professional Conduct and the California Business and Professions Code. The California Supreme Court ordered Kassas to pay restitution to 56 former clients, costs for his disciplinary proceedings, and any funds that would eventually be paid out by the State Bar's Client Security Fund (CSF) to victims of his conduct. Kassas subsequently filed for Chapter 7 bankruptcy and received a discharge.

Kassas sought a declaration that all of his debts to the State Bar were discharged in the bankruptcy. The State Bar argued that Kassas's disciplinary costs and reimbursements

to the CSF were excepted from discharge pursuant to 11 U.S.C. § 523(a)(7) as "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and . . . not compensation for actual pecuniary loss." The bankruptcy court granted summary judgment for the State Bar. *In re Kassas*, 631 B.R. 469 (Bankr. C.D. Cal. 2021). The court concluded that while the restitution payments were discharged, the disciplinary costs and reimbursements paid from the CSF were not. Finding that the dischargeability of reimbursements from the CSF is a matter of public importance, the bankruptcy court certified the following question to us: "Is indebtedness arising from a disbarred attorney's obligation to reimburse the State Bar for payments made by the CSF to victims of that attorney's misconduct while practicing law non-dischargeable under 11 U.S.C. § 523(a)(7)?" *In re Kassas*, 2021 WL 2446270, at *2 (Bankr. C.D. Cal. June 15, 2021). We answer that such indebtedness is dischargeable, and we reverse the judgment in part.

I. BACKGROUND AND PROCEEDINGS

A. *Background*

1. The Statutory Framework

In 1971, the California Assembly created a CSF "to relieve or mitigate pecuniary losses caused by the dishonest conduct of licensees of the State Bar . . . arising from or connected with the practice of law." Cal. Bus. & Prof. Code § 6140.5(a) (West 2011). Under the California State Bar's CSF Rules, "[t]o qualify for reimbursement, an applicant must establish a loss of money or property that was received by an active attorney who was acting as an attorney or in a fiduciary capacity customary to the practice of law." Cal.

State Bar Rule 3.430(A). "The loss must have been caused by dishonest conduct" and the attorney must have "been disbarred, disciplined, or voluntarily resigned from the State Bar; died or been adjudicated mentally incompetent; or . . . become a judgment debtor of the applicant in a contested proceeding or been convicted of a crime." *Id.* at 3.430(B), (C), 3.432(A). Decisions "to deny or limit reimbursement" are ultimately made by the CSF Commission, a five-member body. *Id.* at 3.421(A), 3.430(D).

When an application is received, the CSF Commission can investigate the application "as it deems appropriate," including requiring the submission of declarations, holding evidentiary hearings, and compelling witnesses and documents by subpoena. *Id.* at 3.441(A), (C). The Commission's decision to reimburse an applicant "must be based on a preponderance of the evidence." *Id.* at 3.441(I). The maximum reimbursement allowed per applicant is $100,000. *Id.* at 3.434(A).

The CSF Commission must serve a Notice of Intention to Pay on the attorney responsible for the conduct in an application. *Id.* at 3.442(C), 3.445(A). The attorney has thirty days to submit an objection. *Id.* at 3.442(D). If an objection is received, the Commission will conduct further review, and if no objection is received, the CSF may pay the applicant. *Id.* The CSF Commission must also serve a notice of its Tentative Decision, which includes a statement of the findings or reasons on which the decision is based, to the attorney and applicant, who have thirty days to lodge a written objection. *Id.* at 3.443(A), (B), 3.445(B). Only after the parties have an opportunity to submit objections, requests, or declarations in response to the Tentative Decision can the CSF Commission issue a Final Decision. *Id.* at 3.444(A). An

attorney or applicant can petition for review of the CSF's Final Decision in California Superior Court. Cal. State Bar Rule 3.450; *see also State Bar of Cal. v. Statile*, 86 Cal. Rptr. 3d 72, 81 (Ct. App. 2008).

Pursuant to the statute creating the CSF, once the CSF makes a payment, "the State Bar is subrogated, to the extent of that payment, to the rights of the applicant against any person or persons who . . . caused the pecuniary loss." Cal. Bus. & Prof. Code § 6140.5(b). The statute further provides that

> [a]ny attorney whose actions have caused the payment of funds to a claimant from the Client Security Fund shall reimburse the fund for all moneys paid out as a result of his or her conduct with interest, in addition to payment of the assessment for the procedural costs of processing the claim, as a condition of continued practice.

Id. § 6140.5(c).[1] For an attorney who is disbarred "the reimbursed amount, plus applicable interest and costs, shall be paid as a condition of reinstatement of membership." *Id.* And "[a]ny assessment against an attorney . . . that is part of an order imposing a public reproval on a member or is part of an order imposing discipline or accepting a resignation with a disciplinary matter pending, may also be enforced as a money judgment." *Id.* § 6140.5(d).

[1] The cited version was in effect from January 2, 2012, until December 31, 2018, the time period covering Kassas's disciplinary proceedings. All subsequent citations are to this version of the statute.

2. The Facts

Kassas committed numerous violations of the State Bar Rules of Professional Conduct and California's Business and Professions Code. In January 2014, the California Supreme Court disbarred Kassas. As part of its disciplinary order, the Supreme Court ordered Kassas to make restitution payments to 56 individuals for a total of $201,706, plus ten percent interest per year. The California Supreme Court also awarded costs to the State Bar for the disciplinary proceedings in the amount of $61,122.27. Finally, the California Supreme Court also specified that "[a]ny restitution owed [by Kassas] to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d)."

The CSF made 51 payments to individuals named as restitution recipients in the CSC's order and 305 payments to individuals not named in the order.[2] In total, the CSF paid $1,367,978.12 to Kassas's victims. The typical victim received between $3,000 and $6,000. As of April 2021, including interest and processing costs, Kassas owes the CSF $2,090,096.32.

[2] The California Supreme Court named 56 victims in Kassas's disbarrment order. The State concedes that the restitution owed directly to these individuals is dischargeable. Kassas did not reimburse those former clients, and 51 of the 56 filed for compensation from the CSF. *See In re Kassas*, 631 B.R. at 470. The amount Kassas owed to 51 of those individuals is subsumed within the money paid to the 356 claimants. The State's restitution order remained binding until the debt was discharged. Discharge voids the restitution order and prevents a double recovery by the 51 individuals who obtained reimbursement through the CSF.

B. *The Proceedings Below*

In December 2019, Kassas filed for Chapter 7 bankruptcy. He received a discharge in March 2020. In January 2021, Kassas filed an adversary proceeding in bankruptcy court seeking a declaration that all debts listed in his complaint were discharged in the bankruptcy. The State Bar moved to dismiss the complaint, but the bankruptcy judge converted the motion into a motion for summary judgment and ordered supplemental briefing.

In a published order, the bankruptcy court held that some debts associated with his disciplinary proceedings were dischargeable, while others were not. Three separate debts were the subject of the bankruptcy court's order. 631 B.R. 469. First, the bankruptcy court held that the restitution the California Supreme Court ordered Kassas to pay 56 former clients—totaling $201,706 plus interest—was discharged as debt. *Id.* at 471. The bankruptcy court reasoned that the restitution payments were not a debt "payable to and for the benefit of a government unit," and thus did not come within § 523(a)(7). *Id.* at 472. The State Bar did not dispute this ruling. *Id.* at 471 & n.5; *see supra* n.2. Second, the court held that the $61,112 in disciplinary costs was not discharged under our decision in *In re Findley*, 593 F.3d 1048, 1054 (9th Cir. 2010). 631 B.R. at 471. Kassas acknowledged that the bankruptcy court's judgment on those costs was proper under *Findley*, although he preserved his option to challenge *Findley* in en banc proceedings. *Id.* at 471 & n.6. Third, the bankruptcy court determined that Kassas's debts owed to the State Bar for restitution to persons not named in the Supreme Court's order—more than $2 million—were nondischargeable under 11 U.S.C. § 523(a)(7). The court reasoned that the latter payments to the CSF are "a penalty

imposed in furtherance of the State's interest in punishing and rehabilitating errant attorneys, rather than compensation for actual pecuniary loss." *Id.* at 474. At the same time, the bankruptcy court recognized that the "[t]he Ninth Circuit has not determined whether debt owed to the Client Security Fund is nondischargeable under § 523(a)(7)." *Id.* at 472 (citing *In re Albert-Sheridan*, 960 F.3d 1188, 1194 n.5 (9th Cir. 2020) (stating that the issue of the dischargeability of reimbursements to the CSF was not before the court)). But the court determined that the primary purpose of making attorneys reimburse the CSF is rehabilitative not compensatory. *Id.* at 474. The bankruptcy court certified a direct appeal to this court, pursuant to 28 U.S.C. § 158(d)(2)(A), because the judgment "involves a matter of public importance" and "involves a question of law as to which there is no controlling decision of the court of appeals for the circuit." *In re Kassas*, 2021 WL 2446270, at *2 (Bankr. C.D. Cal. June 15, 2021) (quoting 28 U.S.C. § 158(d)(2)(A)(i)). We granted permission to appeal pursuant to § 158(a).

II. STANDARD OF REVIEW

We review de novo the bankruptcy court's decision regarding dischargeability of a debt. *See In re Scheer*, 819 F.3d 1206, 1209 (9th Cir. 2016). "Because a fundamental policy of the Bankruptcy Code is to afford debtors a fresh start, 'exceptions to discharge should be strictly construed against an objecting creditor and in favor of the debtor.'" *Id.* (quoting *In re Riso*, 978 F.2d 1151, 1154 (9th Cir. 1992)).

III. ANALYSIS

We have two issues before us. The first issue is the question certified by the bankruptcy court regarding the dischargeability of reimbursement owed the CSF for payments to Kassas's former clients. The second issue relates to the dischargeability of the costs of the proceedings, which we held nondischargeable in *In re Findley*, 593 F.3d at 1054.

A. *Payments From the CSF Are Dischargeable Under § 523(a)(7)*

A discharge in bankruptcy under Chapter 7 releases the debtor from personal liability for pre-bankruptcy debts. Section § 523 of Title 11 exempts certain debts from discharge. In this case, the State Bar claims that Kassas's obligation to reimburse the CSF is exempt from discharge under § 523(a)(7). That section provides:

> an individual debtor [is not discharged] from any debt—
>
> to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . .

11 U.S.C. § 523(a)(7). We have understood § 523(a)(7) to encompass three separate elements, each of which must be satisfied before a debt is nondischargeable. That is, the nondischargeable debt "must (1) be a fine, penalty, or forfeiture; (2) be payable to and for the benefit of a governmental unit; and (3) not constitute compensation for

actual pecuniary costs." *In re Albert-Sheridan*, 960 F.3d at 1193; *see also Kelly v. Robinson*, 479 U.S. 36, 51 (1986).

Only two of the three elements are in play here. Neither party disputes that the State Bar is a governmental entity. *See* Cal. Const. art. VI, § 9 ("The State Bar of California is a public corporation."); *see also Keller v. State Bar of Calif.*, 496 U.S. 1, 11–13 (1990); *Hirsh v. Justices of the Sup. Ct.*, 67 F.3d 708, 715 (9th Cir. 1995). Thus, we need only determine whether reimbursement to the CSF is "a fine, penalty, or forfeiture" and not "compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7). The question of when restitution may be considered a fine or penalty has been a difficult question. *See Kelly*, 479 U.S. at 52 (holding "a criminal judgment that takes the form of restitution" is within "the penal goals of the State" and is nondischargeable).

We have had our own back-and-forth over the nature of costs imposed in attorney disciplinary matters. In *In re Taggart*, 249 F.3d 987 (9th Cir. 2001), we held that the costs of attorney disciplinary proceedings in California were "not penal in nature." *Id*. at 994. In response to *Taggart*, California amended the statute requiring the payment of such costs and specified that such costs are "penalties . . . to promote rehabilitation and to protect the public." Cal. Bus. & Prof. Code § 6086.10(e). In *In re Findley*, we revisited the question of disciplinary costs. 593 F.3d 1048 (9th Cir. 2010). We concluded that the amendment made clear that California "enacted attorney disciplinary costs to serve penal and rehabilitative ends [and] thus undermines the result in *Taggart*." *Id.* at 1054. After *Findley*, such costs are nondischargeable in bankruptcy. *See also In re Scheer*, 819 F.3d at 1211(holding that the State Bar's attempt to enforce an arbitration award in favor of Scheer's former

client was "not a fine or penalty" but "purely compensatory" and not subject to § 523(a)(7)).

We do not need to reach the question whether the California Supreme Court's order that Kassas repay the CSF is a fine or penalty, because we conclude that the restitution payments at issue here are "compensation for actual pecuniary loss." *In re Albert-Sheridan*, 960 F.3d at 1193 n.3 ("Because the discovery sanctions do not meet the governmental unit or non-compensatory elements, we need not address whether they are also fines, penalties, or forfeitures under the Code."). As we discuss below, at every step of the CSF process, the State Bar is focused on compensating victims for their actual pecuniary losses or seeking compensation for the CSF's actual payments.

First, the stated purpose of the CSF is "to relieve or mitigate *pecuniary losses* caused by the dishonest conduct of active members of the State Bar." Cal. Bus. & Prof. Code § 6140.5(a) (emphasis added). The CSF has all the hallmarks of a secondary, public insurance program overseen by an administrative agency. *See* State Bar Rule 3.434(B)(2) (excluding reimbursement for "a loss covered by any indemnity, such as insurance, fidelity guarantee, or bond"). The State Bar's rules limit reimbursement to "loss of money or property that was received by an active attorney" and excludes other damages, including interest and consequential losses. *Id.* at 3.430(A), 3.434(B). The amount of pecuniary loss is determined after a deliberative process overseen by the CSF Commission. *Id.* at 3.421(A). Upon application by a putative victim, the Commission makes an initial determination, called a Notice of Intention to Pay. *Id.* at 3.442(A). The attorney must be served with the Notice and given an opportunity to contest the claim, including at an oral

hearing. *Id.* at 3.442(D), 3.443(B). Counsel to the CSF issues a tentative decision, which may be appealed to the CSF Commission. Any final decision of the Commission must be in writing. *Id.* at 3.444(B)(1). That decision may be appealed to California Superior Court. *Id.* at 3.450.

Second, once the CSF has made payment to a victim, the attorney's obligation is to "*reimburse* the fund for all moneys paid out." Cal. Bus. & Prof. Code § 6140.5(c) (emphasis added). That obligation distinguishes these payments from fines and penalties because they are reimbursement for victims' actual pecuniary loss. Although fines and penalties such as restitution to crime victims "may be calculated by reference to the amount of harm the offender has caused," *Kelly*, 479 U.S. at 52, criminal restitution does not necessarily demand the precision imposed by California's CSF scheme. As the Supreme Court in *Kelly* observed, some states "do[] not require imposition of restitution in the amount of the harm caused. Instead [they may] provide[] for a flexible remedy tailored to the defendant's situation." *Id.* at 53. The CSF, by contrast, requires attorneys to reimburse the CSF only for the amount the CSF paid the attorney's clients, an amount limited to actual "pecuniary loss." Cal. Bus. & Prof. Code § 6140.5(b). That makes the reimbursements—whether by the CSF to the client, or by the attorney to the CSF—more in the nature of the arbitration fee award at issue in *In re Scheer*—an award we described as "purely compensatory." *In re Scheer*, 819 F.3d at 1211.

Finally, reinforcing the idea that the CSF is a form of public insurance, the statute enforces the State Bar's right to reimbursement by granting the State Bar a right of "subrogat[ion], to the extent of that payment, to the rights of the applicant." Cal. Bus. & Prof. Code § 6140.5(b).

Subrogation is "the substitution of another person in place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or claim." *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, 77 Cal. Rptr. 2d 296, 302 (Ct. App. 1998). "In the insurance context, subrogation takes the form of an insurer's right to be put in the position of the insured for loss that the insurer has both insured and paid." *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 49 Cal. Rptr. 3d 785, 790 (Ct. App. 2006). Thus, when an insurance company is subrogated to the rights of its insured, it "step[s] into the shoes of the insured and assert[s] the insured's rights against the third party." *Progressive West Ins. Co. v. Sup. Ct.*, 37 Cal. Rptr. 3d 434, 441 (Ct. App. 2006). The insurer "cannot acquire by subrogation anything to which the insured has no rights, and may claim no rights which the insured does not have." *Transcon. Ins. Co. v. Ins. Co. of Penn.*, 56 Cal. Rptr. 3d 491, 498 (Ct. App. 2007) (internal quotation marks and citations omitted). Although there are some technical differences between subrogation and reimbursement, where the statute creating the CSF uses both terms, we must conclude that "both the subrogation rights and reimbursement rights . . . fall within the rubric of subrogation." *21st Cent. Ins. Co. v. Sup. Ct.*, 213 P.3d 972, 976 n.3 (Cal. 2009). Accordingly, the CSF is limited—both by its organic statute and by long-standing principles of subrogation—to recovering the "actual pecuniary costs," 11 U.S.C. § 523(a)(7), of the "pecuniary losses caused by the dishonest conduct of licensees of the State Bar," Cal. Bus. & Prof. Code § 6140.5(a).

Considering the totality of the CSF program, even if reimbursement serves some penal or rehabilitative purpose, we conclude that any reimbursement to the CSF is payable to and for the benefit of the State bar and is compensation for

the CSF's actual pecuniary loss. There is a certain symmetry in our conclusion. The State Bar did not object to the bankruptcy court's conclusion that the reimbursement Kassas owed 56 of his former clients was subject to discharge. *In re Kassas*, 631 B.R. at 470–71. The State Bar only objected to discharge of Kassas's debt to the CSF, which reimbursed an additional 305 of Kassas's clients. *Id.* Our conclusion means that any debt that Kassas owes his clients and is obligated to pay either (1) directly to them or (2) to the CSF because the CSF has made payments to his clients is subject to discharge in bankruptcy. In other words, the dischargeability of Kassas's debt does not turn on whether the CSF decides to step in to compensate his former clients and then seek subrogation against him. Were we to conclude otherwise, Kassas could obtain a discharge for debts he owed directly to 56 of his clients but not for debts owed to the 305 of his clients compensated by the CSF.

We in no way disparage the laudable and important service performed by the CSF. Our decision does not relieve Kassas of his failings as a member of the California Bar. *See In re Scheer*, 819 F.3d at 1212. Our conclusion is controlled by § 523(a)(7).

In sum, we answer the question certified by the bankruptcy court: Indebtedness arising from a disbarred attorneys' obligation to reimburse the State Bar for payments made by the CSF to victims of that attorney's misconduct are not excluded from discharge under§ 523(a)(7). The judgment of the bankruptcy court will be reversed on this issue.

B. *Disciplinary Costs Are Nondischargeable Under § 523(a)(7)*

Kassas also appeals the bankruptcy court's judgment holding the costs associated with his disciplinary proceedings nondischargeable. Kassas acknowledges that the bankruptcy court was bound by our decision in *In re Findley*. We are also bound by that decision. A panel can only depart from our own precedent "if a subsequent Supreme Court opinion 'undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *In re Nichols*, 10 F.4th 956, 961 (9th Cir. 2021) (alteration in original) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). No such intervening precedent or change to the statute exists here. Thus, we have no occasion to reconsider *In re Findley*. *See In re Albert-Sheridan*, 960 F.3d at 1192 (refusing to reconsider *In re Findley* in holding that debt to the State Bar for the costs of attorney discipline proceedings is nondischargeable). As a result, in accordance with the clear directive of *In re Findley*, we affirm the bankruptcy court's finding that Kassas's disciplinary costs of $61,122.27 were not discharged in his bankruptcy. *See* 593 F.3d at 1054. If Kassas wishes to pursue this issue, he must do so through a petition for rehearing en banc.

IV. CONCLUSION

We reverse the bankruptcy court's judgment that an obligation to reimburse the State Bar for payments by the CSF is nondischargeable under 11 U.S.C. § 523(a)(7). We

affirm the bankruptcy court's judgment, holding that Kassas's disciplinary costs were not discharged.

AFFIRMED IN PART, REVERSED IN PART.

Keith M. Lundin
U.S. Bankruptcy Judge
Dated: 01/12/11

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

In re: WILLIAM D. LOVE, ***Debtor.***	Case No. 08-04970 Chapter 7 Hon. Keith M. Lundin
WILLIAM D. LOVE, ***Plaintiff*,** ***v.*** **THOMAS S. SCOTT, Chairman, TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY, in his official capacity,** ***Defendant*.**	Adv. No. 09-00446

MEMORANDUM

The issue is whether costs assessed by the Tennessee Board of Professional Responsibility during attorney disciplinary proceedings are a nondischargeable fine or penalty under 11 U.S.C. § 523(a)(7). The assessment of costs was compensation for actual pecuniary loss and was discharged in debtor's Chapter 7 case. The following are findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

FACTS

Debtor filed Chapter 7 on June 12, 2008 and received a discharge on October 17, 2008. Among the scheduled creditors was Defendant, Tennessee Board of Professional Responsibility ("TBPR").

The parties have stipulated that Debtor owes TBPR "in excess of $24,693.66 for costs associated with the prosecution of . . . multiple hearings before the [TBPR]." The parties stipulate that the costs charge to Debtor "are the actual costs associated with the prosecution of the disciplinary action, including, but not limited to, costs for transcripts, court reporters and hearing room rental. Attorney time is also assessed. Disciplinary counsel's time is tracked by a computer program . . . and the rates charged depend on the type of work done."

The debt of TBPR arose from a series of disciplinary actions against Debtor starting in the mid-1990s, that resulted in several license suspensions and other sanctions. *See Board of Professional Responsibility v. Love*, No. M2007-00790-SC-R3-CV, slip op. (Tenn. May 12, 2008).[1] On July 28, 2005, Debtor petitioned for reinstatement of his law license. *Board of Professional Responsibility v. Love*, No. M2007-00790-SC-R3-CV, at 4. The Hearing Panel appointed by TBPR concluded that Debtor had satisfied all conditions for reinstatement in the multiple suspension orders except for payment of costs. *Board of Professional Responsibility v. Love*, No. M2007-00790-SC-R3-CV, at 4-5. The Panel recommended reinstatement subject to three conditions: 1) Debtor practice in a group or with a practice monitor for one year; 2) Debtor enter into a five year contract

[1] The conditions set by order of the Tennessee Supreme Court on November 23, 1998, as preconditions to reinstatement of Debtor's law license were: a) Completion of an Ethics course at a law school approved by the Board of Law Examiners; b) Completion of alcohol treatment program to be approved by the Board of Professional Responsibility; c) Demonstration of sobriety at the time of any petition for reinstatement; d) Full compliance with all restitution orders and agreements; e) Payment to the Board of Professional Responsibility of costs of $1,752.65. (Jt. Stip. at ¶ 4.)

with Tennessee Lawyers Assistance Program with protocols to monitor his sobriety; and, 3) Debtor reimburse TBPR for "disciplinary fees" of $9,043.07 pursuant to a payment plan agreeable to disciplinary counsel.

TBPR petitioned the Tennessee Supreme Court for certiorari. Review of the Panel's decision resulted in modification of the conditions for reinstatement including that all past due costs and fees be paid in full. *Board of Professional Responsibility v. Love*, No. M2007-00790-SC-R3-CV, at 6. After an unsuccessful motion to modify, Debtor appealed directly to the Tennessee Supreme Court. By opinion dated May 12, 2008, the Supreme Court held that under Tenn. Sup. Ct. R. 9, § 24.3, repayment in full of disciplinary costs was a condition to reinstatement.

On June 26, 2009, Debtor moved to reopen his Chapter 7 case to file this adversary proceeding against TBPR. The complaint asserts that TBPR has refused to reinstate Debtor's law license due only to Debtor's failure to pay disciplinary costs assessed prepetition. Debtor submits that TBPR's refusal is a violation of the discharge injunction in 11 U.S.C. § 524 because the cost assessments were reimbursement of pecuniary loss for purposes of § 523(a)(7) and were discharged. On cross-motions for summary judgment, Debtor relies on the language of Tennessee Supreme Court Rule 9, § 24.3 and *State Bar of California v. Taggart*, 249 F.3d 987 (9th Cir. 2001), for the conclusion that disciplinary costs are not fines or penalties but are reimbursement for actual expenses of the disciplinary system in Tennessee.

TBPR counters that the costs assessed are part of the penalty imposed upon Debtor in the disciplinary proceedings. TBPR says that repayment of fees and costs is punishment and part of the rehabilitative process under the applicable rules. Rather than reimbursing actual expenses, TBPR

argues that disciplinary costs are assessed "to deter future indiscretions by other lawyers and to rehabilitate" attorneys who engage in misconduct.

Following argument on summary judgment, the court invited the parties to submit briefs on the applicable Tennessee Supreme Court Rules. In particular, the court asked counsel for the TBPR whether there was any relevant history, reports or secondary discussion of the Tennessee Supreme Court Rules with respect to the assessment of disciplinary costs. No briefs were filed.

DISCUSSION

Dischargeability under 11 U.S.C. § 523(a)(7)

Section 523(a)(7) excepts from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss," other than certain tax penalties. 11 U.S.C. § 523(a)(7). Nondischargeability under § 523(a)(7) requires proof of three elements: 1) a debt payable to and for the benefit of a governmental unit; 2) the debt must be in the nature of a fine, penalty or forfeiture; and 3) the debt must not be compensation for actual pecuniary loss. *See Kelly v. Robinson*, 479 U.S. 36, 50-1, 107 S Ct. 353, 93 L. Ed. 2d 216 (1986).

The parties stipulate that TBPR is a governmental unit under 11 U.S.C. § 101(27).[2] Consideration of the second and third elements must begin with *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986).

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[2] Governmental unit means "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." 11 U.S.C. § 101(27). State-appointed attorney disciplinary boards and commissions have been uniformly classified as "governmental units" under § 101(27). *See, e.g., Attorney Grievance Comm'n of Md. v. Smith (In re Smith)*, 317 B.R. 302, 306-07 (Bankr. D. Md. 2004) (collecting cases).

In *Kelly*, Ms. Robinson pled guilty to larceny for wrongful receipt of welfare benefits from the state of Connecticut. Robinson was placed on probation conditioned that she make restitution. *Kelly*, 479 U.S. at 39. Robinson filed bankruptcy and the State sought a determination that the restitution was nondischargeable under § 523(a)(7).[3] The bankruptcy and district courts found the restitution nondischargeable. The Second Circuit reversed concluding that the restitution award was compensation for actual pecuniary loss for purposes of § 523(a)(7).

The Supreme Court reversed, considering § 523(a)(7) "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." *Kelly*, 479 U.S. at 44. Justice Powell traced this focus forward, starting with the treatment of criminal judgments under the Bankruptcy Act of 1898:

> Despite clear statutory language, most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court. . . . This reasoning was so widely accepted by the time Congress enacted the [1978] Code that a leading commentator could state flatly that "fines and penalties are not affected by a discharge."
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> . . . Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity.
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> Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. . . . This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions."
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> * * *

[3] The State in *Kelly* was stuck with its § 523(a)(7) argument in no small measure because it failed to timely assert nondischargeability under the "fraud" exceptions in 11 U.S.C. § 523(a)(2) and (a)(4).

> . . . Congress included two qualifying phrases [to dischargeability under § 523(a)(7)]; the fines must be both "to and for the benefit of a governmental unit," and "not compensation for actual pecuniary loss." Section 523(a)(7) protects traditional criminal fines, it codifies the judicially created exception to discharge for fines. . . .
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> . . . [N]either of the qualifying clauses in § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. . . . Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. . . . [T]he decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. . . . This point [was] well illustrated by the Connecticut statute [at issue in *Kelly*]. . . .
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> . . . [It did] not require imposition of restitution in the amount of the harm caused. Instead, it provid[ed] for a flexible remedy tailored to the defendant's situation.
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> Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, . . . restitution orders imposed in such proceedings operate 'for the benefit of' the State. . . . [T]hey are not assessed "for . . . compensation" of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State. Those interests are sufficient to place restitution orders within the meaning of § 523(a)(7).
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> In light of the strong interest of the States, the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, . . . this result best effectuates the will of Congress.

Kelly, 479 U.S. at 45-53 (internal citations and footnotes omitted).

Despite repeated emphasis in *Kelly* on protecting state *criminal* proceedings and on respecting well-established Act precedent, with near unanimity, courts that have considered the

dischargeability of attorney disciplinary cost assessments have applied *Kelly* to find such costs nondischargeable.[4]

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[4] *See Richmond v. New Hamp. Sup. Ct. Comm. on Prof. Conduct*, 542 F.3d 913 (1st Cir. 2008) (Costs assessed in attorney disciplinary proceedings are nondischargeable fines under § 523(a)(7). Under New Hampshire rules "'[a]ll expenses incurred by the committee and by bar counsel in the investigation and enforcement of discipline shall be paid by the New Hampshire Bar Association in the first instance but may, in whole or in part, be assessed to a disciplined attorney to the extent appropriate.' . . . The discretionary nature of New Hampshire cost assessments strongly suggests that they should be viewed as penalties. . . . [T]he New Hampshire Supreme Court has made clear that the 'appropriateness' of the costs sanction is based on the disciplined attorney's conduct. This is strong evidence that the cost assessments are being imposed as part of a sanction. . . . [T]he cost assessments imposed by the New Hampshire Supreme Court in attorney disciplinary proceedings are not similar to costs awarded to prevailing parties in civil litigation. While the latter are essentially routine, the former are quite discretionary and are intended to sanction attorney misconduct. Thus, they are 'fines' or 'penalties' within the meaning of § 523(a)(7). . . . While a cost award might 'resemble' compensation for an actual loss, 'the context in which it is imposed [might] undermine[ ] that conclusion.' . . . [W]e look to the context in which the penalty is imposed to determine whether its purpose is truly compensatory. . . . [A] civil penalty may qualify as non-dischargeable if 'the particular penalty . . . serve[s] some 'punitive' or 'rehabilitative' governmental aim, rather than a purely compensatory purpose.' . . . [C]osts assessed in New Hampshire disciplinary proceedings are not 'purely compensatory.' . . . [C]ost assessments serve both to deter attorney misconduct and to help rehabilitate wayward attorneys. Rehabilitation and deterrence are the same public functions that were at issue in *Kelly*. It is irrelevant that the cost assessment may be calculated by reference to the actual loss. . . . [T]he 'mere fact that a penal sanction is calculated by reference to actual costs does not, in and of itself, transform the penalty into compensation for pecuniary loss.' . . . [T]he Committee is not concerned with recouping its litigation costs to the degree that it is concerned with deterring unprofessional conduct."); *Commission for Lawyer Discipline v. Tindall (In re Tindall)*, Case No. 05-49642, Adv. No. 08-03359, 2009 WL 1231878 (Bankr. S.D. Tex. Apr. 29, 2009) (Under Texas Disciplinary Rules, discretionary award of attorney fees and costs is a penalty for § 523(a)(7) purposes. The award is based on factors outlined by state Disciplinary Rules. "The factors mimic factors considered in criminal matters when determining the appropriate punishment." In Texas, the disciplinary commission is funded out of the budget for the state bar, and is not dependent upon awards of attorney fees and costs in disciplinary proceedings.); *Logal v. Education Credit Management Corp. (In re Logal)*, 381 B.R. 706, 713 (Bankr. N.D. Ind. 2007) (Summarily dismissing debtor's § 523(a)(7) action, "courts in this Circuit have held that an assessment of a monetary sanction, including the costs of the proceeding, against an attorney arising out of a disciplinary action constitutes a fine, penalty or forfeiture within the meaning of § 523(a)(7)."); *Attorney Grievance Comm'n of Md. v. Smith (In re Smith)*, 317 B.R. 302 (Bankr. D. Md. 2004) (Costs assessed in disbarment proceeding, although the actual costs of the Commission in pursuing the action, constituted a penalty for purposes of § 523(a)(7). Extending *Kelly* to attorney disciplinary proceedings is a natural fit. "The ultimate goal of both criminal and attorney disciplinary proceedings is to protect the public. The imposition of sanctions and costs protect the public by restricting a lawyer's right to practice law . . . . Monetary penalties imposed against the offender, whether part of an attorney disciplinary proceeding or a criminal proceeding, promote the state's penal and rehabilitative interests. . . . [T]he primary purpose for imposing costs is penal, and not compensatory, in that an attorney's rehabilitation is encouraged through the condition to reinstatement imposed by the judgment. The mere fact that a penal sanction is calculated by reference to actual costs does not, in and of itself, transform the penalty into compensation for pecuniary loss." Further, in Maryland, the Commission is funded not by costs awarded in connection with its proceedings, but by annual assessments on attorneys generally.); *Supreme Court of Ohio v. Bertsche (In re Bertsche)*, 261 B.R. 436 (Bankr. S.D. Ohio 2000) ("Because Ohio law similarly reflects that the imposition of disciplinary costs is discretionary, this Court concludes that the costs of an Ohio disciplinary proceeding are nondischargeable pursuant to § 523(a)(7)."); *Carlson v. Attorney Registration & Disciplinary Comm'n (In re Carlson)*, 202 B.R. 946 (Bankr. N.D. Ill.1996) ("[D]isciplinary costs are penal in nature. 'Disciplinary costs are synonymous to a fine imposed as a component of a criminal sentence to be paid to the estate.' 'Restitution obligations imposed as a condition of probation in state criminal proceedings are not dischargeable.' The 'ultimate goal of both criminal proceedings and attorney disciplinary proceedings is to protect the public.' Costs are only assessed in disciplinary

proceedings if the attorney is actually disciplined. The imposition of costs is only triggered by misconduct on the part of the attorney. . . . [E]ven in states where costs assessed under a state rule or statute providing costs for state bar organizations or disciplinary and registration associations, such are not compensatory because state attorney disciplinary associations receive their operating costs through the state, or through annual license registration and renewal fees. Rules requiring disciplined attorneys to pay costs are 'primarily intended to deter attorneys from engaging in improper conduct.'"); *State Bar v. Doerr (In re Doerr)*, 185 B.R. 533 (Bankr. W.D. Mich.1995) (Costs assessed against debtor-attorney under Michigan Court Rule 9.128(A) are nondischargeable. Michigan Rule provides: "Within 14 days of the conclusion of a hearing before a panel, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing. Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, commission and panel allocable to a hearing must be made a part of the report in all matters of discipline and reinstatement. *The hearing panel and the board in an order for discipline* or an order granting or denying reinstatement *must direct the attorney to reimburse the State Bar of Michigan for the expenses of that hearing, review, and appeal, if any*. Reimbursement must be a condition in a reinstatement order. If the respondent fails to reimburse the State Bar of Michigan for the expenses within the time prescribed, a certified report of the nonpayment must be filed with the Supreme Court, and the State Bar of Michigan, and a copy served upon the respondent. The respondent will be suspended automatically, effective 7 days from the mailing of the certified report, and until the respondent pays the costs or the board approves a suitable plan for payment." Court adopts the rationale of *Board of Attorneys Prof. Responsibility v. Haberman (In re Haberman)*, 137 B.R. 292, 294 (Bankr. E.D. Wis.1992), and *Betts v. Attorney Registration and Disciplinary Comm'n*, 165 B.R. 870 (N.D. Ill.), *aff'd*, 51 F.3d 275 (7th Cir. 1994) (table). "Michigan's attorney disciplinary system is not dependent on the payment of debts for its continued operation. . . . [I]mposition of costs constitutes a penalty rather than a reimbursement for pecuniary loss."); *Betts v. Attorney Registration and Disciplinary Comm'n*, 165 B.R. 870, 874 (N.D. Ill.) (Costs imposed to reimburse Illinois Disciplinary Commission under Ill. Sup. Ct. R. 773(b) are a fine or penalty for purposes of § 523(a)(7). The Illinois Supreme Court Rule provides: "It is the duty of a respondent to reimburse the Commission (1) for costs incurred in the investigation, hearing and review of matters brought pursuant to article VII of these rules *which result in the imposition of discipline,* (2) for costs involved in the investigation of alleged violations of the terms and conditions of any such disciplinary order, *when such violation are later proved*, and (3) for costs involved in any proceedings for the enforcement of any rule, judgment or order of this court *which was made necessary by any act or omission on the part of the respondent,* (4) for costs incurred to compel the appearance of respondent and to transcribe respondent's testimony, when the appearance followed *respondent's failure to comply with a request from the Inquiry Board* or Administrator to provide information concerning a matter under investigation, and (5) for costs incurred to obtain copies of records from a financial institution, *when the institution's production of the records followed respondent's failure to comply* with a request from the Inquiry Board or the Administrator to provide those records." Court did not address issue of reimbursement of actual pecuniary loss.) (emphasis in original), *aff'd*, 51 F.3d 275 (7th Cir. 1994) (table); *Board of Attorneys Prof. Responsibility v. Haberman (In re Haberman)*, 137 B.R. 292, 294 (Bankr. E.D. Wis.1992) (Under Wisconsin law, one of the available "types of authorized discipline" for attorney"misconduct" is the imposition of conditions upon reinstatement of an attorney's license to practice law. "[C]osts clearly fall[] within [this] type of discipline as one form of condition for seeking reinstatement . . . . The words 'misconduct' and 'types of discipline' as used in [the Wisconsin statute] indicate that the purpose of the rule is more akin to punishment than to compensation for actual pecuniary loss. . . . Even though assessed costs may result in reimbursement . . . compensation is not the primary objective of the rule. Rather, the rule is primarily intended to deter attorneys from engaging in improper conduct and to convey the message to attorneys and to the public alike that the practice of law is closely scrutinized in order to maintain the Bar's integrity and high standards of professional conduct. Reimbursed costs . . . do not represent any 'actual' pecuniary loss. [The Board] is not dependent upon such reimbursement. Its funding is provided from state appropriations . . . . The ultimate goal of both criminal proceedings and attorney disciplinary proceedings is to protect the public. Sanctions imposed against an offender, whether as part of attorney disciplinary proceedings or criminal proceedings, promote the state's penal and rehabilitative interests. . . . *Kelly v. Robinson* stated that to discharge an obligation to make restitution payments would 'hamper the flexibility of state criminal judges in choosing a combination of imprisonment, fines and restitution most likely to further the rehabilitative and deterrent goals of state criminal court justice systems.' By the same token, if costs arising out of attorney disciplinary proceedings are declared dischargeable,

The maverick among decisions addressing the dischargeability of attorney disciplinary costs is *State Bar of California v. Taggart (In re Taggart)*, 249 F.3d 987 (9th Cir. 2001). In *Taggart*, the Ninth Circuit acknowledged the great weight of decisions declaring attorney disciplinary costs nondischargeable under § 523(a)(7). *Taggart*, 249 F.3d at 993-94. But the Ninth Circuit looked deeper and found those decisions "by and large, analogized the costs of attorney disciplinary proceedings imposed on disciplined attorneys to the costs of criminal litigation imposed on convicted defendants." *Taggart*, 249 F.3d at 993. Focusing on California law, "the structure of the statutes imposing fees on disciplined attorneys, the existence of mandatory fees in the civil context, and the legislative history of the statute imposing monetary sanctions on disciplined attorneys all indicate that California does not view the assessment of costs on disciplined attorneys as penal in nature, analogy to the criminal context is inapt." *Taggart*, 249 F.3d at 994. The route to this conclusion deserves extended quotation:

> Two different sections of the California Business and Professional Code allow for the imposition of fees on disciplined attorneys. Section 6086.10 requires the imposition of the costs of an attorney's disciplinary proceedings on any member of the State Bar who is publicly reproved. Cal. Bus. & Prof. Code § 6086.10. By

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it would impede [the Board's] ability to carry out its designated function."); *Florida Bar v. Cillo (In re Cillo)*, 159 B.R. 340, 342-43 (Bankr. M.D. Fla.1993) (Relying on *Haberman*, 137 B.R. 292 (Bankr. E.D. Wis. 1992), and *In re Garvin*, 84 B.R. 824 (Bankr. M.D. Fla. 1988) (costs imposed as part of criminal sentence are nondischargeable), "the costs of a disciplinary proceeding assessed by the Florida Supreme Court against the Debtor whose license to practice law had been suspended, were in the nature of a 'fine, penalty or forfeiture' payable to or for the benefit to a governmental unit, and is not compensation for actual pecuniary loss. . . . [T]he ultimate goal of both criminal and attorney disciplinary proceedings is to protect the public. Sanctions imposed against the offender, whether as part of an attorney disciplinary proceeding or a criminal proceeding, promote the state's penal and rehabilitative interests."); *In re Williams*, 158 B.R. 488, 490 (Bankr. D. Idaho 1993) (Under Idaho law, costs and expenses are awarded only in attorney disciplinary cases "where a violation of professional practice rules has been found. . . . [I]n this case the expense award is a sanction against Debtor based upon his improper conduct. Sanctions imposed in attorney disciplinary proceedings not only serve a compensatory function, but they also serve to deter attorney misconduct, and in this sense are similar to restitution obligations imposed in criminal prosecutions. It would be a poor policy indeed to suggest that an attorney could elude punishment for professional improprieties by resorting to the Bankruptcy Code.").

contrast, § 6086.13 permits the California Supreme Court to impose, in its discretion, a monetary sanction-in addition to any costs imposed under § 6086.10-on any State Bar member who is suspended or disbarred. *Id.* § 6086.13. A comparison of the plain language of these two sections, a comparison of cost assessment in attorney disciplinary hearings with that in civil litigation, and a review of the legislative history of §6086.13 demonstrate that while fees imposed under § 6086.13 constitute fines or penalties, those imposed under § 6086.10 do not.

First, the fees levied under § 6086.10 are denominated "costs" and are imposed to reimburse the State Bar for "actual expenses" and "reasonable costs" associated with disciplinary hearings. *Id.* §§ 6086.10(a), (b). By contrast, fees authorized by § 6086.13 are described as "monetary sanctions" and are not dependent on any expenditure by the State Bar for their imposition. All that is required is that the attorney suffer the sanction of suspension or disbarment. *Id.* § 6086.13(a). It is also noteworthy that a disciplined attorney may be excused from paying costs under § 6086.10 on the grounds of "hardship, special circumstances, or other good cause." *Id.* § 6086.10(c). No such exception exists for an attorney ordered to pay monetary sanctions under § 6086.13. *See id.* § 6086.13(e) (limiting collection of monetary sanctions to circumstances in which collection would "impair the collection of criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney"). This supports the impression that the California legislature intended monetary sanctions under § 6086.13, but not costs awards under § 6086.10, as punishment.

Second, while § 6086.10 requires disciplined attorneys to pay the costs associated with their disciplinary hearings, that section also entitles exonerated attorneys to reimbursement for the costs of defending themselves. *Id.* § 6086.10(d). Section 6086.10 is therefore analogous to a section of the California Civil Procedure Code that provides prevailing parties in civil suits the right to recover from the other party the prevailing party's costs of litigation. *See* Cal. Civ. Proc. Code §§ 1032(a)(4), (b). The California Supreme Court has noted that disciplinary proceedings before the Bar Court "are *sui generis*, neither civil nor criminal in character. . . . [These proceedings] are administrative but of a nature of their own. . . . [They] are not governed by the rules of procedure governing civil or criminal litigation." Section 6086.10 appears to import into the "sui generis" attorney disciplinary context the standard California civil principle that "prevailing parties" are entitled to recover their costs of litigation.

Finally, the legislative history of § 6086.13 makes it clear that the section was enacted in order to create the possibility of fines in the context of attorney disciplinary proceedings, which did not exist under § 6086.10. *See* Senate Committee On Judiciary, Committee Report For 1991 California Assembly Bill No. 2300 (August 11, 1992) ("[Attorney d]iscipline includes orders of reprimand

> constituting a public or private reproval, suspension from practice, or disbarment. *Fines or similar monetary sanctions are not authorized*, though [Bus. & Prof. Code] Sec. 6086.10 requires disciplined attorneys . . . to reimburse the Bar for *costs incurred* in the disciplinary process . . . .").

Taggart, 249 F.3d at 991-94 (emphasis in original) (footnotes and internal case citations omitted). *See also Schaffer v. Louisiana State Bd. of Dentistry (In re Schaffer)*, 515 F.3d 424 (5th Cir. 2008) (Conducting a *Taggart*-style analysis of a Louisiana statute that imposed costs on a dentist in disciplinary proceedings. "In permitting the assessment of costs in addition to a fine, a plain reading of the of the text suggests that the costs are not a fine, penalty, or forfeiture under § 523(a)(7).").

The California legislature reacted to *Taggart* by amending the statutes regulating attorney disciplinary proceedings. The California legislature added this new subsection:

> In addition to other monetary sanctions as may be ordered by the Supreme Court pursuant to Section 6086.13, costs imposed pursuant to this section are penalties, payable to and for the benefit of the State Bar of California, a public corporation created pursuant to Article VI of the California Constitution, to promote rehabilitation and to protect the public. This subdivision is declaratory of existing law.

CAL. BUS. & PROF. CODE § 6086(e).

The dischargeability of attorney disciplinary costs under the amended statute came before the Ninth Circuit in *State Bar of California v. Findley (In re Findley)*, 593 F.3d 1048 (9th Cir. 2010). The *Findley* panel began its analysis of the amended statute by restating its reasoning in *Taggart*:

> First, we analyzed the § 6086.10 costs in light of § 6086.13 of the California Business and Professions Code, a separate statute authorizing discretionary "monetary sanctions" for attorney misconduct. We concluded that the statutory language of § 6086.10—which imposed "costs" for "actual expenses" and "reasonable costs"—as well as the existence of a hardship exemption under § 6086.10, but not § 6086.13, "support[ed] the impression that the California legislature intended monetary sanctions under § 6086.13, but not costs awards under § 6086.10, as punishment." Next, we considered the legislative history of § 6086.13, and determined that "the section was enacted in order to create the possibility of fines in the context of attorney disciplinary proceedings, which did not exist under

> § 6086.10." Finally, we observed similarities between attorney disciplinary costs imposed under § 6086.10 and the costs awarded to prevailing parties in civil litigation. Reasoning by analogy that it was "highly unlikely" that California "imposed mandatory costs in civil proceedings in order to punish losing parties or to deter them from bringing litigation," we concluded that the legislature intended for the § 6086.10 costs to serve compensatory ends.

Findley, 593 F.3d at 1051-52 (internal citations and footnote omitted).

The *Findley* court then held that the statutory amendments undermined the foundation of *Taggart*:

> First, § 6086.10(e) clarifies that the California legislature's intent in imposing attorney disciplinary costs was "to promote rehabilitation and to protect the public," rather than to provide compensation, as we inferred in *Taggart*.
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> Second, § 6086.10(e) eliminates the distinction we identified in *Taggart* between the "costs" imposed through § 6086.10 and the "sanctions" leveled through § 6086.13, by labeling attorney disciplinary costs as "penalties" imposed "[i]n addition to other monetary sanctions." The plain language of the amended provision thus strongly suggests that the California legislature disagreed with the *Taggart* court's inferences about its intent in enacting § 6086.10.
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> The legislative history of the provision supports this conclusion. The Enrolled Bill Report for Assembly Bill 1708, the vehicle for adding subsection (e) of the amended § 6086.10, stated:
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> > One of these [new] provisions [in Section 6086.10] would clarify that orders to pay disciplinary costs, like the costs of prosecution imposed on criminal defendants, would be analogous to fines and not dischargeable in bankruptcy.
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> It further stated that:
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> > Section 6086.10 would (1) enable the Bar to pursue orders for disciplined attorneys to pay the costs of their discipline . . . as money judgments; and (2) specify that orders to pay disciplinary costs are penalties, as originally intended by the Legislature, and therefore not dischargeable in bankruptcy.
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> *Id.* Finally, Lawrence Doyle, drafter of the amendment, explained in a declaration submitted for the record that:

> Section 6086.10(e) was added to the California Business and Professions Code to expressly clarify and re-state the intent of the California Legislature that disciplinary costs are monetary sanctions and are a part of the punishment imposed on California lawyers for professional misconduct by making him or her pay for part of the costs of the proceeding.
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> . . . The California legislature's express statement in the 2003 amendment to § 6086.10(e) that it enacted attorney disciplinary costs to serve penal and rehabilitative ends thus undermines the result in *Taggart*.
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> For these reasons, we conclude that the 2003 amendments to Cal. Bus. & Prof. Code §6086.10 are sufficient to render attorney discipline costs imposed by the California State Bar Court non-dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(7).

Findley, 593 F.3d at 1052-54.

The Sixth Circuit has addressed dischargeability under § 523(a)(7) and applied the Supreme Court's rationale in *Kelly* in contexts other than attorney disciplinary costs. *See Hughes v. Sanders*, 469 F.3d 475 (6th Cir. 2006); *Tennessee v. Hollis (In re Hollis)*, 810 F.2d 106 (6th Cir. 1987) (per curiam).

Hollis was a criminal case and the Sixth Circuit hewed closely to *Kelly*. In *Hollis*, probation ordered by a state criminal court was conditioned that the debtor pay $408.75 in court costs. *Hollis*, 810 F.2d at 107. The Sixth Circuit held the court costs were nondischargeable:

> This issue requires the Court to delve behind the apparent meaning of section 523(a)(7). The assessment of costs against appellee clearly was intended, at least in part, to compensate the State for the expense it had incurred in prosecuting appellee in state criminal court. It thus appears not to satisfy the third requirement stated above. The Supreme Court stated in *Kelly*, however, that in this kind of case a court must consider the language of section 523(a)(7) "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." The Supreme Court's consideration of these factors led it to conclude that "§ 523(a)(7) preserves from discharge *any* condition a state criminal court imposes as part of a criminal

> sentence." It noted in support of its holding that the criminal justice system operates primarily for the benefit of society as a whole and serves to fulfill the penal goals of the State, and that unlike most debts, a financial obligation imposed as a condition of probation does not arise out of a contractual, statutory, or common law duty, but rather is based on a State's traditional penal obligations and goals.
>
> In light of the Supreme Court's decision in *Kelly*, the issue before us here boils down to whether the state criminal court assessed costs against appellee as part of his criminal sentence. We believe that the answer to that issue is yes. The state criminal court clearly intended the assessment of costs to be a condition of appellee's probation under section 40-21-109. TENN. CODE ANN. § 40-21-109 (1982). An assessment of costs, moreover, appears to be an appropriate condition of probation under this section.

Id. at 108 (internal case citations omitted).

More recently, the Sixth Circuit considered the scope of § 523(a)(7) in a noncriminal context in *Hughes v. Sanders*, 469 F.3d 475 (6th Cir. 2006). In *Hughes*, the plaintiff contended that an attorney malpractice judgment entered by default as a sanction for discovery abuse was nondischargeable under § 523(a)(7). There was no dispute that the default judgment was "punitive in nature." *Hughes*, 469 F.3d at 477. The Sixth Circuit addressed two issues under § 523(a)(7): whether the judgment was payable to and for the benefit of a governmental unit; and, whether the judgment was compensation for actual pecuniary loss.

Reading *Kelly* carefully, the Sixth Circuit panel in *Hughes* first rejected the view of many other courts that the identity of the beneficiary was irrelevant to § 523(a)(7) analysis. The restitution in *Kelly* was payable to the state. The judgment in *Hughes* was payable to the victim. *See also Tennessee Bd. Prof'l Responsibility v. Brooks (In re Brooks)*, Case No. 04-15901, Adv. No. 04-1290, 2008 WL 1924040 (Bankr. E.D. Tenn. Apr. 28, 2008) (Restitution ordered paid by disciplined attorney was not payable to State and was dischargeable under rationale of *Hughes*.).

More importantly, even had Hughes prevailed on the element of "payable to and for the benefit of a governmental unit," the Sixth Circuit concluded he could not satisfy the requirement that the judgment not be compensation for actual pecuniary loss. "[T]he debt owed by [debtor] was a default judgment in an amount explicitly calculated to compensate Hughes for malpractice damages, litigation costs and attorney's fees. That the judgment [was] . . . entered . . . as a sanction for [debtor's] inexcusable and unprofessional conduct [did] not change the judgment's compensatory character." *Id.* at 479.

The Sixth Circuit in *Hughes* framed *Kelly* this way: "[The] *Kelly* Court's repeated rational for its determination that a criminal restitution judgment [was] not dischargeable [was] the importance of shielding the states from federal interference with the states' criminal justice systems. . . . *Kelly* applies narrowly to criminal restitution payable to a governmental unit." *Hughes*, 469 F.3d at 478-79. The Sixth Circuit repeated the admonition in *Kelly* that its interpretation of the Bankruptcy Code reflected "a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. . . . '[T]he fundamental policy against federal interference with state criminal prosecutions.' . . . [T]he States' interest in administering their criminal justice systems free from federal interference . . . ." *Kelly*, 479 U.S. at 47-49.

Tennessee Board of Professional Responsibility and Tennessee Supreme Court Rules

The Tennessee Supreme Court Rule mandating the assessment of costs against attorneys "[i]n the event [of] a judgment of disbarment, suspension, public censure, private reprimand, temporary suspension, disability inactive status, reinstatement, or denial of reinstatement" aligns with the

statutory provisions before the Ninth Circuit in *Taggart* and before the Fifth Circuit in *Schaffer*: it is not intended as a fine or penalty, but is compensation for actual pecuniary loss.

The Tennessee Supreme Court has declared its inherent authority to regulate the practice of law. *See Doe v. Board of Prof'l Responsibility*, 104 S.W.3d 465, 469 (Tenn. 2003); *Petition of Burson*, 909 S.W.2d 768, 772 (Tenn. 1995) ("'There is no provision of the Tennessee Constitution that specifically grants the Tennessee Supreme Court the authority to regulate the practice of law. Rather, the authority derives from the doctrine of separation of powers . . . . The authority to regulate the practice of law has been described as 'inherent power' that results from the Court's position in the judicial branch of government.'") (internal citations omitted).

In 1976, the Tennessee Supreme Court created disciplinary rules and established the Board of Professional Responsibility (then known as the Disciplinary Board of the Supreme Court of Tennessee) to enforce those rules. *See* www.tbpr.org; *see also In re Petition of the Tennessee Bar Ass'n*, 532 S.W.2d 224 (Tenn. 1975). "In furtherance of [its] duty to regulate the practice of law in Tennessee . . . when appropriate, [the Tennessee Supreme Court may] discipline attorneys who violate the rules governing the legal profession." *Doe*, 104 S.W.3d at 470.

Rule 9 of the Tennessee Supreme Court Rules addresses discipline of lawyers. Section 4 of Rule 9, is entitled "Types of Discipline." The types of discipline available to TBPR in the event of misconduct are disbarment (§ 4.1), suspension (§ 4.2), temporary suspension (§ 4.3), public censure (§ 4.4), private reprimand (§ 4.6), private informal admonition (§ 4.6), or restitution (§ 4.7). Restitution may be ordered in addition to any other type of discipline. SUP. CT. TENN. R. 9, § 4.7 (Restitution was specifically added as an additional form of discipline by amendment effective July 1, 2006.)

Several sections of Rule 9 mandate the assessment of costs against an attorney subject to TBPR proceedings. Section 24 of Rule 9—entitled "Expenses, Audit, Reimbursement of Costs"—provides:

> 24.1. Expenses. The salaries of Disciplinary Counsel and staff, their expenses, administrative costs, and the expenses of the members of the Board and of members of the district committees shall be paid by the Board out of the funds collected under the provisions of Rule 9.
>
> *24.3. Reimbursement of Costs. In the event that a judgment of disbarment, suspension, public censure, private reprimand, temporary suspension, disability inactive status, reinstatement, or denial of reinstatement* results from formal proceedings, the Board *shall assess against the respondent the costs of the proceedings*, including court reporter's expenses for appearances and transcription of all hearings and depositions, the expenses of the hearing panel in the hearing of the cause, and the hourly charge of Disciplinary Counsel in investigating and prosecuting the matter.
>
> The respondent attorney may petition the Board for relief from costs within thirty days of receipt of the final bill of costs or on the termination of any action upon which the disciplinary proceeding was based, whichever occurs last. . . .
>
> The hourly charges of Disciplinary Counsel on formal proceedings filed prior to January 27, 1992, shall be assessed at $20 per hour for investigative time and $30 per hour for trial time. The hourly charges of Disciplinary Counsel on formal proceedings filed on or after January 27, 1992, shall be assessed at $30 per hour for investigative time incurred prior to the filing of formal proceedings and $80 per hour in connection with formal proceedings.
>
> *Payment of the costs assessed by the Board pursuant to this rule shall be required as a condition precedent to reinstatement of the respondent attorney.*

SUP. CT. TENN. R. 24 (emphasis added).[5] The Tennessee Supreme Court has recognized the mandatory nature of costs under this Rule. *Walker v. Board of Prof'l Responsibility*, 38 S.W.3d 540, 549 (Tenn. 2001) (Rule 9, § 24.3 "requires the imposition of costs in all disciplinary cases").

Section 19 of Rule 9 addresses reinstatement of an attorney's license, and mandates payment of costs associated with reinstatement proceedings.

> **19.6.** Petitions for reinstatement under this Rule *shall be accompanied by an advance cost deposit* in an amount to be set from time-to-time by the Board *to cover anticipated costs of the reinstatement proceeding*. All advance cost deposits collected hereunder shall be deposited by the Board of Professional Responsibility with the State Treasurer; all such funds including earnings on investments and all interest and proceeds from said funds, if any, are deemed to be, and shall be designated as, funds belonging solely to the Board of Professional Responsibility. *Withdrawals from those funds shall only be made by the Board of Professional Responsibility to cover costs of reinstatement proceedings, and reimbursement of advance cost deposits not expended. . . .*

SUP. CT. TENN. R. 9, § 19.6 (emphasis added).

Rule 9, § 8.5 addresses probation in lieu of a fixed period of suspension. In cases where "there is little likelihood that the respondent will harm the public during the period of rehabilitation and where the conditions of probation can be adequately supervised," § 8.5 provides, "[t]he [attorney]/respondent shall pay the costs associated with probation, including without limitation a reasonable fee for the probation monitor." SUP. CT. TENN. R. 9, § 8.5.

Importantly, § 18 of Rule 9 provides for the return of any costs paid in advance that have not been earned:

> **18.5** Effective Date of Order; Refund of Fees.

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[5] Rule 7 dealing with the licensing of attorneys, Article XIII (Formal Proceedings Before the Board), section 13.05 also includes a "Costs" provision, that provides: "The Board may require payment of or security for the costs and expenses of any hearing before the Board, in such a manner as it deems reasonably compensatory." SUP. CT. TENN. R. 7, § 13.05.

> Orders imposing disbarment, suspension, or transfers to disability inactive status are effective on a date ten days after the date of the order, except where the Court finds that immediate disbarment, suspension, or interim suspension is necessary to protect the public. The *respondent shall refund within ten days after entry of the order any part of any fees, expenses, or costs paid in advance that has not been earned or expended*, unless the order directs otherwise.

SUP. CT. TENN. R. 9, § 18.5 (emphasis added).

Among all the Rules for reimbursement of costs associated with proceedings before TBPR, there is a single reference to a monetary penalty other than restitution. Rule 9, § 20 requires an annual assessment from all Tennessee attorneys. Failure to pay the assessment results in summary suspension. SUP. CT. TENN. R. 9, § 20.3. "Any attorney suspended under the provisions of 20.3 above shall be reinstated without further order upon payment of all arrears and *a penalty of 20% of the amount due* from the date of the last payment to the date of the request for reinstatement." SUP. CT. TENN. R. 9, § 20.4 (emphasis added).

These cost assessment provisions collectively define a scheme intended to reimburse TBPR the costs it incurs administering attorney discipline in Tennessee. The Tennessee Rules provide specifically for the return of any costs paid in advance and not earned. SUP. CT. TENN. R. 9, § 18.5. There is no hint in the Tennessee Rules that assessment of costs is intended to serve any public purpose other than to defray the expenses of the licensing and disciplinary system.[6] SUP. CT. TENN. R. 9, § 24. The single reference to a monetary penalty appears in the unrelated context of an attorney's failure to pay the annual assessment. SUP. CT. TENN. R. 9, § 20.4

Costs under § 24.3 are assessed not only for disciplinary proceedings that end in disbarment, suspension or a lesser discipline, but also in the non-punitive context of disability inactive status.

[6] Defendant TBPR was invited to offer any history or secondary authority that might bear on this issue. TBPR came forward with no such history, and this court's research uncovered none.

Disability inactive status results "[w]here an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability or detained or placed in the custody of a center for the treatment of mental illness after a probable cause hearing[.]" SUP. CT. TENN. R. 9, § 21.1. Prior disciplinary proceedings or complaints are *not* a prerequisite to this status. An attorney may petition the court for self-imposed disability inactive status. SUP. CT. TENN. R. 9, § 21.2.

In contrast to the concerns of the Supreme Court in *Kelly*, there is no history of noninterference between bankruptcy law and the costs of attorney disciplinary proceedings. TBPR does not cite any pre-1978 decision of any court finding disciplinary costs nondischargeable in bankruptcy. Our research has failed to reveal any such case. It cannot be said that the fear of interference in state *criminal* proceedings that motivated the decision in *Kelly* has analogy to attorney disciplinary proceedings in Tennessee.[7] The Sixth Circuit recognized this logic in *Hughes* and refused to extend *Kelly* into the admittedly punitive context of a default judgment in civil litigation.

Cost assessments in attorney disciplinary proceedings in Tennessee are singularly intended to compensate the TBPR for actual pecuniary loss. Not unlike the debtor in *Hughes*, that the cost assessment here was entered in proceedings that punished Debtor for unprofessional conduct does not change its compensatory character. *See Hughes*, 469 F.3d at 479. The amount assessed against this Debtor was explicitly calculated to compensate the TBPR for costs of the proceedings,

[7] Several of the reported decisions dealing with the dischargeability of disciplinary costs characterize attorney disciplinary proceedings as "quasi-criminal" to explain reliance on *Kelly*. *See, e.g.*, *In re Bertsche*, 261 B.R. at 438-39; *In re Cillo*, 159 B.R. at 348; *In re Haberman*, 137 B.R. at 295-96. This would be an odd characterization here given that assessment of attorney disciplinary costs in Tennessee is purely a creature of procedural rules promulgated by the Tennessee Supreme Court without hook in any provision of law enacted by a legislative body. The absence of analogy to criminal law is not fatal to application of 11 U.S.C. § 523(a)(7), but this disconnect punctuates why *Kelly* does not compel application of § 523(a)(7) in this context.

"including court reporter's expenses for appearances and transcription of all hearings and depositions, the expenses of the hearing panel in the hearing of the cause, and the hourly charge of Disciplinary Counsel in investigating and prosecuting the matter." SUP. CT. TENN. R. 9, § 24.3.

CONCLUSION

The costs assessed in attorney disciplinary proceedings against the Debtor were discharged in his Chapter 7 bankruptcy. TBPR may not hold Debtor's law license hostage to payment of the discharged costs. Plaintiff's motion for summary judgment is granted; Defendant's motion for summary judgment is denied.

An appropriate Order will be entered.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

In re: WILLIAM D. LOVE, ***Debtor.***	Case No. 08-04970 Chapter 7 Hon. Keith M. Lundin
WILLIAM D. LOVE, ***Plaintiff*,** ***v.*** **THOMAS S. SCOTT, Chairman, TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY, in his official capacity,** ***Defendan*t.**	Adv. No. 09-00446

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This Order has Been electronically signed. The Judge's signature and Court's seal appear at the top of the first page.
United States Bankruptcy Court.

ABA Formal Opinion No. 99-414
September 8, 1999

Ethical Obligations When a Lawyer Changes Firms

A lawyer's ethical obligations upon withdrawal from one firm to join another derive from the concepts that clients' interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent him. The departing lawyer and the responsible members of her firm who remain must take reasonable measures to assure that the withdrawal is accomplished without material adverse effect on the interests of clients with active matters upon which the lawyer currently is working. The departing lawyer and responsible members of the law firm who remain have an ethical obligation to assure that prompt notice is given to clients on whose active matters she currently is working. The departing lawyer and responsible members of the law firm who remain also have ethical obligations to protect client information, files, and other client property. The departing lawyer is prohibited by ethical rules, and may be prohibited by other law, from making in-person contact prior to her departure with clients with whom she has no family or client-lawyer relationship. After she has left the firm, she may contact any firm client by letter.

When a lawyer ceases to practice at a law firm, both the departing lawyer and the responsible members of the firm who remain have ethical responsibilities to clients on whose active matters the lawyer currently is working to assure, to the extent reasonably practicable, that their representation is not adversely affected by the lawyer's departure. In this Opinion, the Committee addresses obligations under the Model Rules of Professional Conduct that a lawyer has when she leaves one law firm for another, including the following: (1) disclosing her pending departure in a timely fashion to clients for whose active matters she currently is responsible or plays a principal role in the current delivery of legal services (sometimes referred to in this Opinion as "current clients"); (2) assuring that client matters to be transferred with the lawyer to her new law firm do not create conflicts of interest in the new firm and can be competently managed there; (3) protecting client files and property and assuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of her withdrawal; (4) avoiding conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with her planned withdrawal; and (5) maintaining confidentiality and avoiding conflicts of interest in her new affiliation respecting client matters remaining in the lawyer's former firm.[1]

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[1] This Opinion addresses mainly the obligations of the departing lawyer. Nevertheless, the firm members remaining, and especially those with supervisory responsibility, have an obligation under the Rules of Professional Conduct, and may have obligations as well under other law, to assure to the extent reasonable practicable that the withdrawal from the firm is accomplished without material adverse effect on any clients' interests, especially clients on whose active matters the departing lawyer currently is working. *Cf.* ABA Informal Opinion 1428 (1979), decided under the former Model Code of Professional Responsibility, and California Bar Ethics Op. No. 1985-86, 1985 WL 57193 *2 (Cal. St. Bar. Comm. Prof. Resp. 1985), both of which place the responsibility of notifying clients upon the departing lawyer and her firm. Among remaining firm members'ethical obligations are to make reasonable efforts to ensure that there are in effect measures: (1) to keep clients informed pursuant to Rule 1.4(b) of the impending departure of a lawyer having substantial responsibility for the clients' active matters; (2) to make clear to those clients and others for whom the departing lawyer has worked and who inquire that the clients may choose to be represented by the departing lawyer, the firm or neither(*see Restatement (Third) of the Law Governing Lawyers* § 26 cmt. h (Proposed Official Draft 1998);(3) to assure that active matters on which the departing lawyer has been working continue to be managed by remaining lawyers with competence and diligence pursuant to Rules 1.1 and 1.3; and (4) to assure that, upon the firm's withdrawal from representation of any client, the firm takes reasonable steps to protect the client's interests pursuant to Rule 1.16(d). *See infra*, n.4 and accompanying text. This Opinion does not address the issue of a division of fees between the departing lawyer and her law firm.

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The departing lawyer also must consider legal obligations other than ethics rules that apply to her conduct when changing firms, as well as her fiduciary duties owed the former firm. The law of agency, partnership, property, contracts, and unfair competition impose obligations that are not addressed directly by the Model Rules. These obligations may affect the permissible timing, recipients, and content of communications with clients and which files, documents, and other property the departing lawyer lawfully may copy or take with her from the firm. Although the Committee does not advise upon issues of law beyond the Model Rules, we must take account of other law in construing the Rules;so must the departing lawyer before determining an appropriate course of action.

Notification to Current Clients Is Required

The impending departure of a lawyer who is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in a matter (i.e., the lawyer's current clients), is information that may affect the status of a client's matter as contemplated by Rule 1.4.[2] A lawyer who is departing one law firm for another has an ethical obligation, along with responsible members of the law firm who remain, to assure that those clients are informed that she is leaving the firm. This can be accomplished by the lawyer herself, the responsible members of the firm, or the lawyer and those members jointly. Because a client has the ultimate right to select counsel of his choice,[3] information that the lawyer is leaving and where she will be practicing will assist the client in determining whether his legal work should remain with the law firm, be transferred with the lawyer to her new firm, or be transferred elsewhere. Accordingly, informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him.[4]

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[2] Rule 1.4 (Communication) states:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

Comment[1] to Rule 1.4 provides that "the client should have sufficient information to participate intelligently in decisions concerning ... the means by which they [the objectives of the representation] are to be pursued...."

[3] Rule 1.16 (Declining Or Terminating Representation) in paragraph (a)(3) states in pertinent part that a lawyer "shall withdraw from the representation of a client if ... the lawyer is discharged." *See also* Comment [4]; Restatement § 26 cmt h, *supra* n.1.

[4] State ethics opinions also have determined that, under the Model Rules, a departing lawyer has an ethical duty to inform current clients that she is leaving the firm. *See, e.g.*, District of Columbia Bar Legal Ethics Committee Op. No. 273 (1997); State Bar of Michigan Std. Com. on Prof. and Jud. Ethics Op. No. RI-224, 1995 WL 68957 (Mich. Prof. Jud. Eth. 1995). *See also* Rule 1.16(d), *infra* n.8. The ABA Committee gave approval under the former Model Code of Professional Responsibility for a partner or associate who is leaving one firm for another to send an announcement soon after departure to those clients for whose active, open, and pending matters the lawyer had been directly responsible immediately before resignation. Informal Opinions 1457 (1980) and 1466 (1981). These opinions did not, however, address the question whether the departing lawyer might send notices to any clients *before* resigning.

Notification of Current Clients is Not Impermissible Solicitation

Because she has a present professional relationship with her current clients, a departing lawyer does not

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violate Model Rule 7.3(a)[5] by notifying those clients that she is leaving for a new affiliation. Under Rule 7.3(a), the departing lawyer is, however, prohibited from making in-person contact with firm clients with whom she does *not* have a prior professional or family relationship. A lawyer does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation solely by having worked on a matter for the client along with other lawyers in a way that afforded little or no direct contact with the client.[6] The departing lawyer nevertheless may contact the client through written or oral recorded communication pursuant to Rule 7.2(a), subject to the limitations in Rules 7.1, 7.3(b), and 7.3(c), at least after the lawyer has departed the firm and joined the new firm.[7]

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[5] Model Rule 7.3(a) states:

A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

[6] The rationale for the prohibition is that "there is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to be in need of legal services." Rule 7.3, Comment [1]. The rationale for the exception is that "[t]here is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal (*sic*)or professional relationship...." Rule 7.3, Comment [4]. The Committee views the exception under Rule 7.3(a) to permit in-person solicitation *only* of those current clients of the firm with whom the lawyer personally has had sufficient professional conduct to afford the client an opportunity to judge the professional qualifications of the lawyer and as not extending beyond the text of the Rule to apply to firm clients with whom her relationship is solely personal and not professional. *See, e.g.*, N.C. Bar Opinion 200, 1994 WL 899607 (N.C. St. Bar 1994)(lawyer after departure may contact clients of firm for whom he has been responsible);Arizona Comm. on Rules of Professional Conduct Op. No. 91-17 (June 10, 1991)(permissible before departure to notify clients with whom he had a personal, professional relationship); Kentucky Bar Opinion E-317 (1987) (permissible before departure to notify clients whom he personally represented of his impending departure).

[7] Lawyers are permitted, subject to certain limitations, "to make known their services not only through reputation but also through organized information campaigns. Rule 7.2, Comment [1]. Rule 7.2 permits not only general advertising, but also targeted "written or recorded communication."

The Committee also is of the opinion that a departing lawyer must, under Rule 1.16(d),[8] take steps to the extent practicable to protect her current clients' interests. Moreover, the responsible members of the former firm must themselves comply with Rule 1.16(d) respecting all clients who select the departing lawyer to represent them, whether or not they are current clients of the departing lawyer.[9]

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[8] Model Rule 1.16(d) states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

[9] If a current client chooses to remain with the firm or to move with the departing lawyer to her new firm, the lawyer(s) selected must continue the representation unless withdrawal is necessary under Rule 1.16(a) or permissible under Rule 1.16(b). In the Committee's opinion, "other good cause for withdrawal"does not exist under Rule 1.16(b)(6) solely because the client's matter is difficult or time consuming or has little chance of success, so long as no other enumerated predicate for withdrawal exists.

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A lawyer's duty to inform her current clients of her impending departure is similar to a lawyer's obligation to inform clients if the lawyer will be unavailable to provide legal services to them for an extended period because of major surgery or an extended vacation.[10] In all of these situations, the clients have a right to know of the impending absence so that they can make informed decisions about future representation, even though the lawyer who temporarily will be unavailable is likely to believe that other lawyers in the firm are fully capable of handling the clients' matters during her absence.

[10] *Cf.* Passanante v. Yormack, 138 N.J.Super. 233, 238, 350 A.2d 497, 500 (N.J. 1975), *cert. denied*, 704 N.J. 144, 358 A.2d 199 (N.J. 1976) (lawyer has implicit obligation to inform clients of failure to act for whatever cause to permit clients to engage another lawyer).

The Initial Notice Must Fairly Describe the Client's Alternatives

Any *initial* in-person or written notice informing clients of the departing lawyer's new affiliation that is sent before the lawyer's resigning from the firm generally should conform to the following:

1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);

2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;

3) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters;and

4) the departing lawyer must not disparage the lawyer's former firm.[11]

[11] ABA Informal Opinion 1457 (1980) found consistent with the Model Code of Professional Responsibility the timing, content, and choice of recipients of a form letter announcement by a lawyer that he had resigned from a law firm to become a member of another firm sent "soon after making the change to clients(and only those clients) for whose active, open, and pending matters he was directly responsible as a member of the ABC law firm immediately before his resignation." The form letter stated that the client had a right to decide how and by whom the pending matters would be handled and did not urge the client to choose the departing lawyer over the firm. In ABA Informal Opinion 1466 (1981), Opinion 1457 was extended to include associates, assuming the same fact pattern. The Committee there noted it "does not determine or advise upon issues of law," but then distinguished the facts presented to the Committee from the facts shown in Adler v. Epstein, 393 A.2d 1175 (Pa. 1978), *cert. denied*, 442 U.S. 907 (1979) (departing group of associates enjoined from actively soliciting clients of old firm as part of pre-departure efforts to borrow money on the basis of the clients). Today we reject any implication of Informal Opinions 1457 or 1466 that the notices to current clients and discussions as a matter of ethics must await departure from the firm.

The Departing Lawyer Should Provide Additional Information

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In order to provide each current client with information he needs to make a choice of counsel, the departing lawyer also may inform the client whether she will be able to continue the representation at her new law firm.[12] If the client requests further information about the departing lawyer's new firm, the lawyer should provide whatever is reasonably necessary to assist the client in making an informed decision about future representation, including, for example, billing rates and a description of the resources available at the new firm to handle the client matter.[13] The departing lawyer nevertheless must continue to make clear in these discussions that the client has the right to choose whether the firm, the departing lawyer and her new firm, or some other lawyer will continue the representation.

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[12] The departing lawyer must ensure that her new firm would have no disqualifying conflict of interest in representing the client in a matter under Rule 1.7, or other Rules, and has the competence to undertake the representation. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation. When discussing an association with another firm, the departing lawyer also must be mindful of potentially disqualifying conflicts of interest in her old firm if the new firm currently represents any client with interests adverse to a client of the old firm. Should such a client be identified, the departing lawyer may need to be screened within the old firm no later than the commencement of serious discussions with the new firm. *See* ABA Formal Opinion 96-400. Lastly, the departing lawyer also might find that her work in her former firm would, upon her arrival at the new firm, create a conflict of interest under Rule 1.9 with one of her new firm's clients requiring the creation of a screen that, subject to the affected clients' consents in most jurisdictions, would avoid imputation of her individual conflict of interest to her new firm under Model Rule 1.10(a).

[13] In this respect, we agree with D.C. Bar Legal Ethics Opinion 273 (1997), "Ethical Considerations of Lawyers Moving From One Private Firm to Another."

Joint Notification By the Lawyer and the Firm is Preferred

Far the better course to protect clients' interests is for the departing lawyer and her law firm to give joint notice of the lawyer's impending departure to all clients for whom the lawyer has performed significant professional services while at the firm, or at least notice to the current clients.[14] Unfortunately, this is not always feasible when the departure is not amicable. In some instances, the lawyer's mere notice to the firm might prompt her immediate termination. When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services, in the manner described above, and preferably should confirm the conversations in writing so as to memorialize the details of the communication and her compliance with Model Rules 7.3 and 7.1.[15]

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[14] Cal. Bar Ethics Op. No. 1985-86, 1985 WL 57193 at *2, *supra*, n.1, interprets the California Rule to require both the departing lawyer and the law firm to provide fair and adequate notice of the withdrawal to the client sufficient to allow a client an opportunity to make an informed choice of counsel, and states that, where practical, the notice should be made jointly. ABA Informal Opinion 1428 (1979) suggested that, under the Model Code, both the departing lawyer and the law firm had an obligation to give the client "the choice as to whether or not the client wishes the firm to continue handling the matter or whether the client wishes to choose another lawyer or legal services firm." *See also* Cleveland Bar Opinion 89-5 (under the Model Code, either the departing lawyer or the law firm must give due notice to those clients of the former firm for whose active, open, and pending matters the lawyer is directly responsible).

[15] The responsible members of the law firm must not take actions that frustrate the departing lawyer's current clients' right to choose their counsel under Rule 1.16(a) and Comment [4] by denying access to the clients'files or otherwise. To do so may violate the responsible members' ethical obligations under Rules 1.16(d) and 5.1.

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Law Other Than the Model Rules Applies to the Departure

In addition to satisfying her ethical obligations, the departing lawyer also must recognize the requirements of other principles of law as she prepares to leave, especially if she notifies her current clients before telling her firm she is leaving. For example, the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information to assist her in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters.[16]

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[16] *See, e.g.*, Siegel v. Arter & Hadden, 85 Ohio St. 3d 171, 707 N.E.2d 853 (Ohio Sup. Ct. 1999) (unresolved fact issues precluded summary judgment on unfair competition and trade secret counts because of departing lawyer's use of client list with names, addresses, telephone numbers and matters and fee information, despite notice to firm before notice to clients). *See also* Shein v. Myers, 394 Pa. Super. 549, 552, 576 A.2d 985, 986 (Pa. 1990), *appeal denied*, 533 Pa. 600, 617 A.2d 1274 (Pa. 1991) ("breakaway" lawyers tortiously interfered with contract between their former firm and its clients by taking 400 client files, making scurrilous statements about the firm, and sending misleading letters to firm clients). In a joint opinion, the Pennsylvania and Philadelphia Bars warned that notice to clients before advising the firm of her intended departure "may be construed as an attempt to lure clients away in violation of the lawyer's fiduciary duties to the firm, or as tortious interference with the firm's relationships with its clients." Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Joint Op. No. 99-100, 1999 WL 239079*2. (Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp. 1999). The Committee also noted that the "prudent approach" is for the departing lawyer not to notify her clients before advising the firm of her intention to leave to join another firm. *Id.*

Charges of breach of fiduciary and other duties owed the former firm also might be avoided if the departing lawyer and her new firm go no further than the permissible conduct noted in *Graubard Mollen v. Moskovitz*[17] and avoid the conduct the court found actionable, such as secretly attempting to lure firm clients to the new firm (even when the departing lawyer originated and had principal responsibility for the clients' matters) and lying to clients about their right to remain with the old firm and to partners about the lawyer's plans to leave. Although this case involved civil litigation, other courts have imposed discipline on lawyers for similar conduct because it involves dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c).[18]

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[17] 86 N.Y.2d 112, 653 N.E.2d 1179 (1995). The Court stated that a departing lawyer's efforts to locate alternative space and affiliations would not violate his fiduciary duties to his firm because those actions obviously require confidentiality. Also, informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible. *Id.*at 1183. A departing lawyer should, of course, consult all case law applicable in the practice jurisdiction.

[18] *See, e.g.*, In the Matter of Cupples, 979 S.W.2d 932, 935 (Mo. 1998); *In re* Cupples, 952 S.W.2d 226, 236-37 (Mo. 1997) (separate disciplinary proceedings against involving the same lawyer in connection with his departure from two different law firms, the court held that the lawyer's conduct, which included secreting client files as he prepared to withdraw from a firm, removing files without client consent, failing to inform client of change in nature of the representation, and other actions constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Missouri's counterpart to Model Rule 8.4(c)). *See also In re* Smith, 853 P.2d 449, 453 (Or. 1992) (Before leaving law firm, lawyer met with new clients in his office, had them sign retainer agreements with him, and took files from the office. In imposing a four

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(4)month suspension from practice of law, the Court stated that "[a]lthough there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, such an obligation is implicit in the prohibition of DR 1-102(A)(3) against dishonesty, fraud, deceit, or misrepresentation.").

Entitlement to Files, Documents, and Other Property Depends on The Model Rules and Other Law

A lawyer moving to a new firm also may wish to take with her files and other documents such as research memoranda, pleadings, and forms. To the extent that these documents were prepared by the lawyer and are considered the lawyer's property or are in the public domain, she may take copies with her. Otherwise, the lawyer may have to obtain the firm's consent to do so.

The Committee is of the opinion that, absent special circumstances, the lawyer does not violate any Model Rule by taking with her copies of documents that she herself has created for general use in her practice. However, as with the use of client lists, the question of whether a lawyer may take with her continuing legal education materials, practice forms, or computer files she has created turns on principles of property law and trade secret law. For example, the outcome might depend on who prepared the material and the measures employed by the law firm to retain title or otherwise to protect it from external use or from taking by departing lawyers.

Client files and client property must be retained or transferred in accordance with the client's direction.[19] A departing lawyer who is not continuing the representation may, nevertheless, retain copies of client documents relating to her representation of former clients, but must reasonably ensure that the confidential client information they contain is protected in accordance with Model Rules 1.6 and 1.9.

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[19] *See* Model Rule 1.16(d), *supra*, n.8. Pending client instructions, client property must be held in accordance with Model Rule 1.15.

CONCLUSION

Both the lawyer who is terminating her association with a law firm to join another and the responsible members of the firm who remain have ethical obligations to clients for whom the departing lawyer is providing legal services. These ethical obligations include promptly giving notice of the lawyer's impending departure to those current clients on whose matters she actively is working.

The lawyer does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them.

Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition. She also should take care to act lawfully in taking or utilizing the firm's information or other property.

ABA Formal Opinions

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May 19, 2000

ADVISORY ETHICS OPINION 2000-A-719

(NOT FOR PUBLICATION)

> Inquiry is made concerning to what extent an associate leaving a law firm and going in to business for herself can directly ask for the business of the clients with whom she was the main contact or the sole contact of the firm concerning their case.

The inquiring attorney is an associate who is leaving her firm and going into business for herself, and who wishes to give the clients of the firm with whom she has been the main contact the option of firing the firm and continuing to be represented by her when she commences to practice as a sole practitioner. In order to accomplish this, the inquiring attorney has prepared a draft letter to send to these clients, which she has forwarded to disciplinary counsel for an evaluation of its compliance with her ethical obligations. As an attachment to this draft letter, the inquiring attorney had also prepared a form letter for the client to fill out and send to her former firm if the client wished to fire the firm and retain the inquiring attorney. An appropriately redacted version of the draft letter and the attached form are attached hereto as Exhibit A.

A very similar question was previously addressed in Advisory Ethics Opinion 96-A-585, in which Disciplinary Counsel opined as follows:

The ethical, legal and practical effects of a lawyer withdrawing from a law firm, whether as an associate, partner or member of a professional corporation, have taken on added significance with the increasing mobility of lawyers. Ideally, the problems associated with lawyers departing from law firms should be anticipated and avoided. The use of joint announcement to the firm's clients should be considered.

In the absence of a joint announcement, the departing lawyer is permitted to mail a notice or announcement of departure from the law firm and new association provided, (i) the notice is mailed only to persons with whom the lawyer had an active client-lawyer relationship immediately before departure from the firm; (ii) the notice does not urge the person to sever their client relationship with the lawyer's former firm and does not suggest, recommend or solicit employment of the departing lawyer; and (iii) the notice is brief, dignified and not disparaging of the lawyer's former firm.

The withdrawing member of a law firm should not communicate with clients of the law firm except as permitted hereinabove.

Additionally, the American Bar Association has recently addressed this issue in A.B.A. Formal Opinion No. 99-4 14 (September 8, 1999). Although it is based on the Model Rules rather than the Code of Professional Responsibility, the following relevant portion of that opinion is nevertheless instructive.

Because she has a present professional relationship with her current clients, a departing lawyer does not violate Mode Rule 7.3(a) by notifying those clients that she is leaving for a new affiliation. Under Rule 7.3(a), the departing lawyer is, however, prohibited from making in-person contact with firm clients with whom she does not have a prior professional or family relationship.

The departing lawyer nevertheless may contact the client through written or oral recorded communication pursuant to Rule 7.2(a), subject to the limitations in Rules 7.1, 7.3(b), and 7.3(c), at

least after the lawyer has departed the firm and joined the new firm.

Any initial in-person or written notice informing clients of the departing lawyer's new affiliation that is sent before the lawyer's resigning from the firm generally should conform to the following:

1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (i.e., the current clients);

2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;

3) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and

4) the departing lawyer must not disparage the lawyer's former firm.

The Departing Lawyer Should Provide Additional Information.

In order to provide each current client with information he needs to make a choice of counsel, the departing lawyer also may inform the client whether she will be able to continue the representation at her new law firm. If the client requests further information about the departing lawyer's new firm, the lawyer should provide whatever is reasonably necessary to assist the client in making an informed decision about future representation, including, for example, billing rates and a description of the resources available at the new firm to handle the client matter.

Far the better course to protect clients' interests is for the departing lawyer and her law firm to give joint notice of the lawyer's impending departure to all clients for whom the lawyer has performed significant professional services while at the firm or at least notice to the current clients. . . . When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services, in the manner described above, and preferably should confirm the conversations in writing so as to memorialize the details of the communication . . .

. . . the departing lawyer also must recognize the requirements of other principles of law as she prepares to leave . . . the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information to assist her in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters.

Charges of breach of fiduciary and other duties owed the former firm might be avoided if the departing lawyer and her new firm . . . . avoid . . . secretly attempting to lure firm clients to the new firm (even when the departing lawyer originated and had principal responsibility for the clients' matters) .

Client files and client property must be retained or transferred in accordance with the client's direction.

The lawyer does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them.

Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition. She also should take care to act lawfully in taking or utilizing the firm's information or other property.

The letters attached hereto as Exhibit A do not comply with the parameters set out in the above-quoted opinion for a departing lawyer's initial communication of her impending departure to current clients of the firm she is leaving. These letters go beyond merely giving the client the information that the associate is leaving and giving the client choice of counsel. The letters, taken

together, would seem to go so far as to be essentially "urging" the client to leave the firm and follow the associate. In particular, it is not necessary, in this initial notice, to provide the clients with information about how to extricate themselves from their contracts with the old firm. This information falls into the category of information that "is reasonably necessary to assist the client in making an informed decision about future representation" and thus should only be provided after the initial notice, and even then only if in response to that initial notice the client requests further information about the departing lawyer's new firm. Accordingly, the "form" letter should not be sent to the client in connection with the initial notice of the inquiring lawyer's departure, and the draft letter to the client should be edited to delete the portion of the second paragraph following the first sentence of that paragraph.

Moreover, the inquiring attorney does not seem to have considered the preferred option of sending a notice letter to clients jointly with her old firm. This option should be explored before sending the attached letter, even with the recommended revisions.

The inquiring attorney also raises concerns about the contract her old firm has its clients sign, and her potential liability for interference with that contract if the clients decide to follow her with their business. This is a question of substantive law about which this office cannot opine. As the A.B.A. opinion quoted above states, "the departing lawyer also must recognize the requirements of other principles of law as she prepares to leave . .

Pursuant to Rule 9 (26.5), this opinion is not binding on the Court, the Board, or Ethics Committee and offers no security.

This 19th day of May, 2000.

Lance B. Bracy
Chief Disciplinary Counsel

Theresa M. Costonis
Disciplinary Counsel

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 506 **June 7, 2023**

Responsibilities Regarding Nonlawyer Assistants

A lawyer may train and supervise a nonlawyer to assist with prospective client intake tasks including obtaining initial information about the matter, performing an initial conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, assisting with answering general questions about the fee agreement or process of representation, and obtaining the prospective client's signature on the fee agreement provided that the prospective client always is offered an opportunity to communicate with the lawyer including to discuss the fee agreement and scope of representation. Because Model Rule 5.5 prohibits lawyers from assisting in the unauthorized practice of law, whether a nonlawyer may answer a prospective client's specific question depends on the question presented. If the prospective client asks about what legal services the client should obtain from the lawyer, wants to negotiate the fees or expenses, or asks for interpretation of the engagement agreement, the lawyer is required to respond to ensure that the non-lawyer does not engage in the unauthorized practice of law and that accurate information is provided to the prospective client so that the prospective client can make an informed decision about whether to enter into the representation.[1]

I. Introduction

Nonlawyers[2] provide tremendous client and lawyer support for law firms. This Formal Opinion addresses a lawyer's ethical obligations when the lawyer delegates to a nonlawyer specific prospective client-intake tasks. Lawyers may train and supervise nonlawyers to assist with initial client intake tasks if the lawyers have met their obligations for management and supervision of the nonlawyers pursuant to ABA Model Rule of Professional Conduct 5.3 and prospective clients are given the opportunity to consult with the lawyers to discuss the matter.[3]

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2023. The laws, court rules and opinions, regulations, and rules of professional conduct, promulgated in individual jurisdictions are controlling.

[2] The term "nonlawyer" is used in this Opinion, consistent with the term as used in Rule 5.3, to include all law firm employees, agents, contractors, and vendors who are not licensed lawyers (or otherwise authorized to practice law) but work under the supervision of a licensed lawyer including, for instance, paralegals, legal assistants, case managers, firm administrators, intake staff, and clerks. This term does *not* refer to professionals who are licensed by a jurisdiction to provide legal services in that jurisdiction, such as Arizona Legal Paraprofessionals, Utah Regulatory Sandbox participants, Minnesota Legal Paraprofessional Pilot Project, New York Court Navigators, or Washington Limited License Legal Technicians.

[3] Because this Committee does not opine on substantive legal questions, this Formal Opinion assumes that the assistance provided by the nonlawyer does not violate applicable unauthorized practice of law regulations or statutes. Different jurisdictions may have different views on what constitutes the practice of law.

II. Analysis

A. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

ABA Model Rule of Professional Conduct 5.3 addresses a lawyer's responsibilities regarding nonlawyer assistants.[4] Rule 5.3(a) provides that lawyers who are partners or managers in a firm must ensure that the firm has policies that assure a nonlawyer's conduct is "compatible" with the professional obligations of the lawyer. Paragraph (b) of the Rule requires that lawyers who directly supervise nonlawyer assistants must "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Comment [2] notes, "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment …."[5]

A lawyer's delegation of prospective client intake tasks to a nonlawyer or the lawyer's use of technology to assist with the initial intake of clients provides significant benefits and increased efficiency to lawyers. For example, nonprofit legal services organizations frequently train, supervise, and rely on nonlawyers to perform initial screening of prospective clients to determine whether there are conflicts of interest and whether the prospective clients are requesting services that fall within the organization's practice areas. Similarly, for-profit law firms have offered limited scope online legal services that provide website intake questions, a menu of available limited scope legal document completion services (such as simple powers of attorney, LLC formation, property deed transfers, and name changes), a conflict checking algorithm, and then "click-to-accept-terms" engagement agreements.[6] Delegating initial client intake to nonlawyers also is common in mass tort and class action practices. There, trained intake personnel may check for conflicts of interest, collect basic information from prospective plaintiffs or class members for lawyers to ascertain their eligibility to make a claim, and explain how fees and costs are charged in such cases. If the prospective client meets the eligibility criteria and specifics set forth by the lawyers, then the intake personnel send the prospective clients the standard fee agreement for consideration.

While the benefits of using nonlawyer assistants are many, without proper policies, training, and supervision in place, this delegation could lead to ethical violations and unfortunate consequences for clients and lawyers.[7] The practice must be "carefully and astutely managed."[8]

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[4] MODEL RULES OF PROF'L CONDUCT R. 5.3, cmt. [2] "Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services."

[5] For an extensive analysis of Rule 5.3, see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[6] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 & MODEL RULES OF PROF'L CONDUCT R. 1.18, cmt. [2] for guidance regarding lawyer websites and when an individual becomes a prospective client.

[7] See *In re* Phillips, 226 Ariz. 112, 244 P.3d 549 (2010) (setting forth guidelines for use of nonlawyers in intake process, including applicability of Rule 5.3 and prohibiting nonlawyers from having clients sign engagement agreements without attorney involvement); *In re* Pinkins, 213 B.R. 818 (Bankr. E.D. Mich. 1997) (relying, in part, on State Bar of Mich. Informal Op. RI-128 (1992), superseded by RI-349).

[8] State Bar of Mich. Informal Op. RI-349 (2010).

B. Establishing the Client-Lawyer Relationship

When a prospective client contacts a lawyer for help in solving a legal matter, the lawyer and the prospective client discuss the scope of representation including the client's objectives for the representation and the actions the lawyer will take to achieve the client's goal.[9] Rule 1.5(b) requires a lawyer to communicate to the client the "scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible … 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."[10] Essentially, the client must know what the client bargained for.[11]

Rule 1.4(b) mandates that a lawyer communicate with clients and provide the clients, to the extent reasonably necessary, with explanations that allow the clients to make informed decisions regarding their representation. Some of the communication duties set forth in Rules 1.5(b) and 1.4(b) also apply in the context of explaining fee agreements to prospective clients. We note that Rule 1.4(b) does not expressly apply to prospective clients. Indeed, some of Rule 1.4(a)'s requirements—such as providing updates, consulting about means being employed to address objectives, and responding promptly to requests for information regarding a representation—would not make sense in that context. But it would seem imprudent to wait until after engagement for a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" as required by Rule 1.4(b). ABA Formal Opinion 02-425 (2002) applied Rule 1.4(b) to lawyers who "ask prospective clients to execute retainer agreements that include provisions mandating the use of arbitration to resolve fee disputes and malpractice claims." This interpretation has been extended to explaining "certain implications of the joint representation" by at least one ethics committee.[12] Therefore, we apply Rule 1.4(b) to lawyers when they communicate with both current and prospective clients.

A lawyer may develop policies, train, and supervise a nonlawyer so that the lawyer may delegate to the nonlawyer client intake tasks assuming those tasks do not constitute the practice of law in the applicable jurisdiction. For example, a lawyer may delegate to the nonlawyer obtaining initial information about the matter,[13] performing an initial conflict check,[14] determining whether the assistance sought is in an area of law germane to the lawyer's practice,[15] answering general

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[9] MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

[10] Though the Model Rule states this obligation in the passive context, jurisdictions have interpreted the obligation to communicate this information to be a lawyer's obligation. *See*, *e.g.*, *In re* Freeman, 835 N.E.2d 494, 498 (Ind. 2005). That interpretation logically flows from the conclusion that the Model Rules govern the conduct of lawyers.

[11] GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 9.02, 9-8 (4th ed. 2002); MODEL RULES OF PROF'L CONDUCT R. 1.5(b) ("requires" discussion of fees).

[12] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2017-7 (2017).

[13] Nonlawyers can be trained to obtain the names of all relevant parties, the date(s) of the incident(s) involved, and the nature of the legal matter.

[14] Nonlawyers can be trained to run conflict checks with the firm's systems and to filter for not just parties, but witnesses, opposing counsel, vendors, and other individuals who may create a potential conflict of interest for the firm. However, when a relevant or closely related name comes up in the conflict checking process, the lawyer must be the one to review the similarities and make the final determination of whether or not a conflict exists and whether any such conflict or not it is a waivable conflict.

[15] Where the lawyer's services would involve a single transaction, such as helping companies register their corporation filing documents with the state, with the appropriate training, a nonlawyer would likely be able to

questions about the fee agreement or process of representation, and even obtaining the prospective client's signature on the fee agreement as long as the prospective client is offered an opportunity to communicate with the lawyer to discuss the matter.

While many client-intake tasks lawyers perform may be delegable with proper policies in place, training, and supervision, lawyers who delegate do not relinquish their responsibilities under the Model Rules. Once the attorney-client relationship is formed, lawyers still have the responsibility to reasonably consult with the client regarding the client's objectives and how to achieve them.[16] Lawyers also have the responsibility to "promptly comply with reasonable requests for information" and consult with clients who have engaged them regarding limits on the lawyers' conduct given applicable laws and ethical duties.[17] And, Rules 1.2, 1.4, and 1.5(b) require a lawyer to communicate with clients about fees, the scope of representation, and any limitations thereon.

Whether a nonlawyer may answer a prospective client's *specific question* depends on the question presented and what would be considered to be the practice of law in the jurisdiction. That is important because Model Rule 5.5(a) prohibits lawyers from assisting others in practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. As Comment [2] notes, the definition of the practice of law is established by law and varies from one jurisdiction to another. Lawyers should understand how it is defined in their jurisdiction and take care that the supervised nonlawyers understand that definition and how it limits what nonlawyers may do. For example, whether a nonlawyer may answer a question relating to fee or cost calculation or how payments can be made may depend on whether the question requires the application of law to the facts of the case, as opposed to a question that merely asks about a firm procedural matter. When the question presented would require the application of law to facts, a nonlawyer also may convey a client question to the lawyer, have the lawyer determine the answer to the question, and then relay the lawyer's answer to the client, again, depending on the complexity of the question posed. The lawyer will be responsible for determining if the inquiry is best answered by the lawyer communicating directly with the client, so the lawyer can gather more information to make an informed recommendation.

Nonlawyers may provide general information about how the firm charges legal fees, such as explaining that fees are charged hourly, or on a contingency basis, or the matter is billed at a fixed rate. Or, if the question merely relates to how payments can be processed or other administrative matters, then the nonlawyer may provide information to answer the inquiry. However, if the prospective client asks about what legal services the client should obtain from the lawyer to address the client's objectives, wants to negotiate the fees or expenses, or asks for an interpretation of the rights and responsibilities set forth in the engagement agreement, Model Rules 1.4(b), 1.5, and 5.5[18] require the lawyer to respond. Ultimately, the scope of what the nonlawyers may do in this context will depend on whether the services in question constitute the practice of law in the

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explain the type of services provided for a set fee. Allowing a nonlawyer to answer general questions related to the lawyer's services in such a situation would not require them to provide independent legal advice. However, the nonlawyer must be trained to recognize when the client's questions venture from discussing general services.

[16] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & 1.4(a)(2).

[17] MODEL RULES OF PROF'L CONDUCT R. 1.2 & 1.4(a)(4), (a)(5).

[18] Once the prospective client becomes a client, then Rules 1.2 and 1.4(a) would also be implicated.

jurisdiction where they are being provided.[19] Because Model Rule 5.5(a) precludes lawyers from assisting others in engaging in the unauthorized practice of law, and Model Rule 5.3(b) requires lawyers to reasonably ensure the supervised nonlawyers conduct themselves compatibly with the lawyer's professional obligations, the lawyers are responsible for making sure this line is not crossed.

As noted above, delegation of prospective client intake must be carefully and astutely managed. What appears to be a simple question about how long the lawyer will spend on the matter, may actually be a question about the representation itself and cannot be accurately answered without the lawyer's personal knowledge and expertise.[20] Therefore, a lawyer must provide nonlawyers who are performing client-intake tasks with policies, training, and supervision regarding which questions the nonlawyer may answer, how to respond to those questions, and which questions should be presented to the lawyer.

Conclusion

Nonlawyers provide significant client and lawyer support for law firms. A lawyer may train and supervise a nonlawyer to assist during prospective client intake screening by obtaining initial information about the matter, performing an initial conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, assisting with answering general questions about the fee agreement or process of representation, and even by obtaining the prospective client's signature on the fee agreement provided that these tasks do not constitute the practice of law in the applicable jurisdiction and that the prospective client always is offered an opportunity to discuss the fee agreement and scope of representation with the lawyer.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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[19] Indeed, the question of which jurisdiction's definition of the practice of law should be applied may be subject to a legal analysis. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 504 (2023).

[20] THE LAW OF LAWYERING, *supra* note 11, at §9.04; *see also* ABA MODEL GUIDELINES FOR UTILIZATION OF PARALEGAL SERVICES, Guideline 3(b), at 9, *available at* https://www.americanbar.org/content/dam/aba/administrative/paralegals/aba-model-guidelines-for-utilization-of-paralegal-services-2021-web.pdf ("Many state guidelines prohibit paralegals from "setting fees" or "accepting cases. . . . NALA Ethics Canon 3 states that a paralegal must not establish attorney-client relationships or set fees.").

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 507 **July 12, 2023**

Office Sharing Arrangements with Other Lawyers

It is generally permissible for lawyers to participate in office sharing arrangements with other lawyers under the ABA Model Rules of Professional Conduct. At the same time, office sharing lawyers should appreciate that such arrangements will require them to take appropriate measures to comply with their ethical duties concerning the confidentiality of information, conflicts of interest, supervision of non-lawyers, and communications about their services. The nature and extent of any additional safeguards will necessarily depend on the circumstances of each arrangement.

I. Introduction[1]

Office sharing among lawyers comes in many forms—lawyers with separate law practices sharing office space, support staff, and equipment; law firms renting unused office space to unaffiliated lawyers; or even lawyers sharing an office suite, receptionist, and conference room as part of a virtual law practice or on a temporary basis. Lawyers participating in these arrangements must take appropriate steps to secure client information and clearly communicate the nature of the relationship to the public and their clients.[2] In addition, there are potential conflicts of interest issues that office sharing lawyers must appreciate, including imputed conflicts for lawyers "associated in a firm," representing clients with adverse interests, and consultations between lawyers. This opinion addresses some minimum ethical requirements and suggested practices arising in the office sharing context, particularly in the areas of confidentiality, conflicts of interest, supervision, and communications concerning a lawyer's services.

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2023. The laws, court rules and opinions, regulations, and rules of professional conduct, promulgated in individual jurisdictions are controlling.

[2] Compliance with the obligations imposed by the Model Rules of Professional Conduct, as discussed in this opinion, depends on a lawyer's role, level of authority, and responsibility in the law firm's operations. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483, at n. 6 (2018). *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014). *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 (2022) (Responsibilities of Partners, Managers, and Supervisory Lawyers); MODEL RULES OF PROF'L CONDUCT R. 5.2 (Responsibilities of a Subordinate Lawyer); and MODEL RULES OF PROF'L CONDUCT R. 5.3 (Responsibilities Regarding Nonlawyer Assistance).

II. Discussion

A. Protecting Client Information

Confidentiality is central to the practice of law.[3] Maintaining the confidentiality of client information is therefore imperative for lawyers in an office sharing arrangement.[4] The mere sharing of office space does not automatically equate with the disclosure of client information.[5] The physical arrangement of the shared office space, however, must not expose client information to other office-sharing lawyers and their staff. Everyone should also avoid discussing cases in or near common areas, which could lead to the disclosure of client information.[6]

Depending on the specific circumstances of the office sharing arrangement, lawyers may need to consider additional confidentiality safeguards. This could include separate lobby or waiting areas; refraining from leaving client files out on workspaces, conference rooms, or kitchen tables; installing privacy screens on computer monitors and locking down computers when not actively in use; clean desk policies; and regular training and reminders to staff of the need to keep all client information confidential.[7] Office sharing lawyers can also restrict access to client-related information by securing physical client files in locked cabinets or offices and using separate telephone lines and computer systems.[8] Lawyers, however, may overcome confidentiality concerns with shared telephone and computer systems with appropriate security measures, staff training, and client disclosures.[9]

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[3] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (providing 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)").

[4] State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, 1997 WL 240818, at *3–4 (1997); Conn. Bar Ass'n Prof'l Ethics Comm. 2014-04, 2014 WL 12823983, at *1 (2014); D.C. Bar Ass'n Op. 303, at 1 (2001) [hereinafter D.C. Bar Op.]; La. State Bar Ass'n Rules of Prof'l Conduct Comm. Op. 07-RPCC-013, at 1 (2007); Mich. State Bar Comm. on Prof'l & Judicial Ethics Op. RI-249, 1996 WL 381521, at *2 (1996) [hereinafter Mich. State Bar Op. RI-249]; Mo. Bar Informal Op. 950169, at 1 (1995); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 498, 1982 WL 117856, at *1 (1982); Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, 2022 WL 10219976 (2022); Ohio Bd. of Prof'l Conduct Advisory Op. 2017-05, 2022 WL 10219976, at *1 (2017).

[5] Ill. St. Bar Ass'n Comm. on Prof'l Ethics Advisory Op. 85-14, 1986 WL 378934, at *4 (1986).

[6] State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, 1997 WL 240818, at *3–4 (1997); Colo. Bar Ass'n Ethics Comm. Op. 89, at 5 (2018); Mich. State Bar, Comm. on Prof'l & Judicial Ethics Op. RI-313, 1999 WL 406884, at *1 (1999); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 794, 2006 WL 1386607, at *4 (2006).

[7] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498, at 3–7 (2021) [hereinafter ABA Formal Op. 498] (discussing technologies and related strategies to protect the confidentiality of client information in a virtual practice).

[8] Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 4–7; Ind. State Bar Ass'n Legal Ethics Comm. Op. 8, at 2–3 (1985); D.C. Bar Op. 303, *supra* note 4, at 1; Mo. Bar Informal Op. 980220, at 1 (1998); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op., 2012 WL 6087183, at *1–2 (2012); Ohio Bd. of Prof'l Conduct Advisory Op. 91-9, 1991 WL 717479, at *2 (1991); Va. State Bar Legal Ethics Comm. Op. 754, 1986 WL 1180470, at *1 (1986).

[9] Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 1, 5; D.C. Bar Op. 303, *supra* note 8, at 1; Mo. Bar Informal Op. 970192 (1997); Ohio Bd. of Prof'l Conduct Advisory Op. 92-13, 1992 WL 739420, at *3 (1992); Or. St. Bar Ass'n Op. 2005-50, 2005 WL 5679639, at *1 (2005). *See also* ABA Formal Op. 498, *supra* note 7, at 3–5 (discussing virtual practice technologies and other security measures to safeguard client information); Ohio Bd. of Prof'l Conduct Adv. Op. 2022-11, 2022 WL 10219976, at *2 (2022) (recommending that computers connected to a shared network "be secured by individual credentials and other security measures to prevent lawyers or staff from accessing the data and files on a network belonging to others").

Lawyers in an office sharing arrangement may decide to share support staff, such as receptionists, administrative assistants, and paralegals. In these situations, maintaining the confidentiality of client information is tested. Instructing all lawyers and employees, and particularly shared employees, on their confidentiality obligations and the office procedures in place to guard sensitive client documents and communications are examples of reasonable measures to protect client confidentiality.[10] Of course, appropriate supervision of shared personnel is also required under Model Rule 5.3.[11]

B. Clear Communication About the Relationship

Lawyers who share offices but do not practice together as a law firm must take appropriate steps to clearly communicate the nature of their relationship to the public and to their clients.

Model Rule 7.1 prohibits any "false or misleading communication about the lawyer or the lawyer's services."[12] Comment [7] to the Rule further explains that lawyers "may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading."[13] Accordingly, office-sharing lawyers must ensure that the public is not misled about the nature of their relationship, such as confusion about whether the lawyers are part of a law firm, partnership, or professional corporation when no such affiliation exists.[14]

Lawyers in an office sharing arrangement should use separate business cards, letterhead, and directory listings, as well as office signs, firm names, and advertisements that describe their distinct practices and do not suggest a close association between professionals operating within the same space.[15] It is desirable for lawyers sharing office space to have separate telephone lines, but a

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[10] State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, *supra* note 4, at *3–4; D.C. Bar Op. 303, *supra* note 4, at 1; Mich. State Bar Op. RI-249, *supra* note 4, at *2; Mo. Bar Informal Op. 950169, *supra* note 4, at 1; Neb. Jud. Ethics Comm. Op. 89-2, 1989 WL 1803035, at *4 (1989); Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, *supra* note 4, at *3. *But see* Utah State Bar Advisory Op. 125, 1994 WL 631269, at *2 (1994) (finding it "difficult to see how it would be possible for shared secretarial arrangements not to put confidential information at risk").

[11] Model Rule 5.3 addresses both partner and supervisor responsibilities for ensuring that nonlawyer assistants' behavior is compatible with lawyers' professional obligations. MODEL RULES OF PROF'L CONDUCT R. 5.3. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498, at 3–4 (examining lawyers' supervisory obligations for nonlawyer assistants in a virtual practice); Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, *supra* note 4, at *3 (discussing the sharing of nonlawyer staff).

[12] MODEL RULES OF PROF'L CONDUCT R. 7.1.

[13] *Id.* at cmt. 7. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.0(c) (defining "firm" or "law firm" as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization").

[14] MODEL RULES OF PROF'L CONDUCT R. 1.4 & 7.1; State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, *supra* note 4, at *1; Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 2; D.C. Eth. Op. 303, *supra* note 4, at 1.

[15] State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, *supra* note 4, at *1; Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 6; Conn. Bar Ass'n Prof'l Ethics Comm. Op. 97-9, 1997 WL 700580, at *2 (1997); D.C. Eth. Op. 303, at 1; Mich. State Bar Op. RI-249, *supra* note 4, at * 3; Mo. Bar Informal Adv. Op. 980220, *supra* note 8, at 1; N.Y. City Bar Ass'n Prof'l Ethics Comm. Advisory Op. 680, 1990 WL 677022, at *1 (1990); Ohio Bd. of Comm'rs on Grievances & Discipline Advisory Op. 89-36, 1989 WL 535040, at *2 (1989); Va. State Bar Legal Ethics Comm. Op. 874, 1987 WL 1379105, at *1 (1987).

receptionist may answer a common telephone line with a generic salutation such as "Law Offices" to avoid implying that the lawyers are practicing together in the same firm.[16]

It may not be possible to have separate signage where a law firm subleases excess space to unaffiliated lawyers or to lawyers with whom the firm works on a matter-by-matter basis, or where lawyers work in rented temporary space such as WeWork or Regus™ offices. Nevertheless, unaffiliated lawyers sharing space must take reasonable measures to ensure that clients are not confused about their associations with the other lawyers practicing in the immediate area. Office sharing lawyers must understand the need to clarify for their clients these distinct professional relationships. Any communications to the public should also signal that the law practices are not affiliated with one another, other than in their resource-sharing arrangement.[17]

C. Conflicts of Interest Considerations

Lawyers in shared office arrangements should pay particular attention to (1) avoiding the imputation of conflicts of interest, (2) taking on potential new matters that are adverse to clients represented by other office sharing lawyers, and (3) consulting with fellow office sharing lawyers.

1. Imputation of Conflicts

Model Rule 1.10(a) imputes conflicts of interest to all lawyers "associated in a firm."[18] Thus, imputation of a lawyer's conflict of interest to other lawyers in an office-sharing arrangement will pivot on whether the lawyers are, or appear to the public or their clients as, "associated in a firm."[19]

Under the Model Rules, office sharing lawyers are not automatically treated as a single law firm for conflicts of interest purposes.[20] This determination will depend on the facts and circumstances of each arrangement.[21] Office sharing lawyers who do not protect the confidentiality of their respective clients, regularly consult with each other on matters, share staff who have access to client information, mislead the public about their identity and services, or otherwise fail to keep

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[16] State Bar of Ariz. Op. 01-09 (2001); Conn. Bar Ass'n Prof'l Ethics Comm. Op. 97-9, *supra* note 15, at *2; D.C. Bar Op. 303, at 1; Mich. Eth. Op. RI-249, 1996 WL 381521, at *3; Ohio Adv. Op. 95-1, 1995 WL 813784, at *4 (Ohio Bd. of Comm'rs on Grievances & Discipline 1995); Wash. Adv. Op. 1304, at 1 (Wash. State Bar, Comm on Prof'l Ethics 1989).

[17] Conn. Eth. Op. 2014-04, 2014 WL 12823983, at *1; D.C. Bar. Op. 303, *supra* note 4, at 1; Mich. State Bar Op. RI-249, *supra* note 4, at *2; Mo. Bar Informal Op. 950169, *supra* note 4, at 1.

[18] MODEL RULES OF PROF'L CONDUCT R. 1.10(a).

[19] MODEL RULES OF PROF'L CONDUCT R. 1.10(a) & cmt. 1; Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 1; Mich. State Bar Op. RI-249, *supra* note 4, at *5.

[20] Mich. State Bar Op. RI-249, *supra* note 4, at *1; N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 794, *supra* note 6, at *1 (2011); *see* MODEL RULES OF PROF'L CONDUCT R. 1.0(c) & cmt. 2 (stating that "two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm," but "if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm" under the Model Rules).

[21] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356, at 2–4 (1988) (explaining that whether a temporary lawyer should be treated as "associated in a firm" for conflicts imputation purposes requires "a functional analysis of the facts and circumstances involved in the relationship," with a particular focus on the temporary lawyer's access to information relating to the representation of other firm clients).

their practices separate, are more likely to be treated as "associated in a firm" for conflict imputation purposes.[22]

2. Representing Clients with Adverse Interests

Where lawyers in an office sharing arrangement properly shield the confidentiality of their respective clients and do not hold themselves out to the public as members of the same firm, it may be permissible under the Model Rules to represent clients with adverse interests—even in the same lawsuit or transaction.[23] Although this determination will ultimately turn on specifics of the office sharing arrangement and the nature of the proposed representations, Model Rules 1.4 and 1.7 may obligate lawyers to disclose the details of the office sharing arrangement to their respective clients, including their efforts to maintain confidentiality, and to obtain each clients' informed consent, confirmed in writing.[24]

In addition, any staff shared by the lawyers should not possess or otherwise have access to information from both adverse clients.[25] Implementing an adequate ethical screen between shared staff members can be an effective measure in this regard, and to avoid the sharing of client information more generally.[26]

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[22] *In re* Sexson, 613 N.E.2d 841, 843 (Ind. 1993); MODEL RULES OF PROF'L CONDUCT R. 1.0(c) & cmt. 2; Ariz. State Bar Comm. on the Rules of Prof'l Conduct Op. 01-09, at 1 (2001); Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 1, 4; D.C. Bar Op. 303, *supra* note 4, at 1; Ky. Bar Ass'n Ethics Comm. Op. E-418, at 4 (2001); Ind. State Bar Ass'n Legal Ethics Comm. Op. 8, *supra* note 8, at 3; La. State Bar Ass'n Rules of Prof'l Conduct Comm. Op. 07-RPCC-013, *supra* note 4, at 3; Mo. Bar Informal Op. 950169, *supra* note 4, at 1; N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 794, *supra* note 6, at *4; N.Y. City Bar Ass'n Prof'l Ethics Comm. Advisory Op. 680, *supra* note 15, at *2; Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, *supra* note 4, at *2; S.C. Bar Ethics Advisory Comm. Op. 08-11, 2008 WL 8089795, at *2 (2008); Utah State Bar Advisory Op. 125, *supra* note 10, at *2; Vt. Bar Ass'n Prof'l Responsibility Comm. Op. 79-22, at 1 (1979).

[23] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1486, at 1 (1982) [hereinafter ABA Informal Op. 1486] (lawyers who share space and represent adverse interests in pending lawsuits should explain fully the relationship to, and obtain the consent of, clients to continue to represent adverse interests).; Md. State Bar Ass'n Op. 1987-43, at 1 (1987); Mo. Bar Informal Adv. Op. 970192, *supra* note 9, at 1; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 515, 1983 WL 106225, at *1–2 (1983); Ohio Bd. of Prof'l Conduct Advisory Op. 89-005, 1989 WL 535010, at *1 (1989); Or. St. Bar Ass'n Op. 2005-50, *supra* note 9, at *1; S.C. Bar Ethics Advisory Comm. Op. 08-11, *supra* note 22, at *2 (2008); S.C. Bar Ethics Advisory Comm. Op. 91-37, 1992 WL 810417, at *1–2 (1992); Vt. Bar Ass'n Prof'l Responsibility Comm. Op. 80-15, at 1–2 (1980); Va. State Bar Legal Ethics Comm. Op. 943, 1987 WL 1378998, at *1 (1987); Va. State Bar Legal Ethics Comm. Op. 799, 1986 WL 1180507, at *1 (1986); Wash. State Bar Comm. on Prof'l Ethics Op. 1793, at 1 (1997); Wash. State Bar Comm. on Prof'l Ethics Op. 1559, at 1 (1994).

[24] ABA Informal Op. 1486, *supra* note 23, at 1; Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 4; Md. Eth. Op. 1987-43, at 1; Mich. Eth. Op. RI-249, 1996 WL 381521, at *3; N.J. Eth. Op. 515, 1983 WL 106225, at *1–2; Ohio Adv. Op. 89-005, 1989 WL 535010, at *2 (Ohio Bd. of Comm'rs on Grievances & Discipline 1989); S.C. Bar Ethics Advisory Comm. Op. 91-37, *supra* note 23, at *1–2; Vt. Bar Ass'n Prof'l Responsibility Comm. Op. 80-15, *supra* note 23, at 1–2; Va. State Bar Legal Ethics Comm. Op. 943, *supra* note 23, at *1; Wash. State Bar Comm. on Prof'l Ethics Op. 1793, *supra* note 23, at 1.

[25] Ky. Bar Ass'n Ethics Comm. Op. E-406, at 3 (1998); Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n Op. 41, at 1 (2019); Or. St. Bar Ass'n Op. 2005-50, *supra* note 9, at *1; S.C. Bar Ethics Advisory Comm. Op. 91-37, *supra* note 23, at *1–2. The Committee does not believe it is possible for lawyers in an office sharing arrangement to maintain this kind of separation when representing clients with adverse interests if the lawyers together share only one staff member.

[26] *See generally* Cal. Lawyers Ass'n Ethics Comm. Formal Op. 2021-1 (2021) (discussing elements of effective ethical screens).

Notwithstanding the ability of office sharing lawyers to represent clients with adverse interests, some state ethics opinions understandably advise lawyers to avoid these situations entirely.[27] Potential pitfalls range from inadvertent disclosures of client information in a shared office to opposing parties coincidentally scheduling meetings at the same time. Before entering an office sharing arrangement, it is prudent for a lawyer to examine the nature of the other lawyers' practices to determine whether conflicts of interest are likely to arise.[28]

3. Consultations Between Office Sharing Lawyers

It is natural for lawyers in office sharing arrangements to informally consult one another about their respective client matters. Merely engaging in informal consultations from time to time, however, does not result in the lawyers being "associated in a firm" under Model Rule 1.10(a).[29] At the same time, lawyers who occasionally consult with other lawyers in shared office arrangements should not disclose "client information that may reveal the identity of a client or privileged information."[30] Lawyers may instead discuss issues using hypothetical facts. As comment [4] to Model Rule 1.6 explains, "[a] lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."[31]

Consultations between office sharing lawyers can also trigger unanticipated conflicts of interest, restricting a consulted lawyer's ability to represent a current or future client under Model Rule 1.7(a)(2).[32] For instance, if Lawyer A and Lawyer B share office space, and Lawyer A divulges client information to Lawyer B during an informal consultation to help Lawyer A prepare a case for trial, then Lawyer B may assume a responsibility not to use or reveal the information, which could materially limit Lawyer B's ability to represent a current or future client.[33] This situation parallels the confidentiality duties that lawyers owe to prospective clients under Model Rule 1.18 and the conflicts problems that can surface if a lawyer receives too much information from a prospective client during an initial consultation.[34]

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[27] Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 3; S.C. Bar Ethics Advisory Comm. Op. 08-11, *supra* note 22, at *2; Va. State Bar Legal Ethics Comm. Op. 943, *supra* note 23, at *1; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1474, at 1 (1982) (concluding that "representation of opposing sides by lawyers working in the same military office and sharing common secretarial and filing facilities should be avoided").

[28] Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 3.

[29] Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, *supra* note 4, at *1.

[30] *Id.*

[31] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4.

[32] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411, at 7 (1998) [hereinafter ABA Formal Op. 98-411].

[33] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2); ABA Formal Op. 98-411, at 9. *See also* Liebnow v. Boston Enterprises, 296 P.3d 108, 115 (Colo. 2013) (citing ABA Formal Op. 98-411, at 7) (concluding that where "one lawyer has consulted another lawyer and has revealed confidential information about her case, including her theory of the case and trial strategy, that could materially limit the consulted attorney's ability to represent the opposing party ... due to the consulted attorney's potential responsibility to keep the information confidential").

[34] MODEL RULES OF PROF'L CONDUCT R. 1.18. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 492 (2020) (discussing lawyers' obligations to prospective clients and the conflicts issues that can surface if lawyers receive "significantly harmful" information from a prospective client).

To prevent these issues, Lawyer B can conduct a standard conflict check prior to any informal consultation or collaboration with Lawyer A.[35]

III. Conclusion

The ABA Model Rules of Professional Conduct permit lawyers to participate in office sharing arrangements, but those doing so must fully consider and comply with their applicable ethical responsibilities, including confidentiality, conflicts of interest, supervision, and communications concerning a lawyer's services.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

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[35] *See generally* Conn. Bar Ass'n Prof'l Ethics Comm. Op. 98-11, 1998 WL 993681, at *1–2 (1998).

SO ORDERED.
SIGNED this 7th day of July, 2022

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

AMY ELIZABETH HECKER

Debtor

Case No. 3:21-bk-31938-SHB
Chapter 7

MEMORANDUM AND ORDER

The Court entered an Order on May 27, 2022 ("May 27 Order") [Doc. 46], that, *inter alia*, directed Debtor's former counsel, Christopher Shawn Roberts, to appear and show cause why he should not be held in contempt and sanctioned pursuant to 11 U.S.C. § 105(a) and the Court's inherent powers, including but not limited to (A) requiring him to self-report his conduct to the Tennessee Board of Professional Responsibility and (B) suspension from filing cases or representing clients before the Northern Division of the United States Bankruptcy Court for the Eastern District of Tennessee until further order of the Court following an investigation of his conduct before this Court by the Tennessee Board of Professional Responsibility for violations of 11 U.S.C. § 526(a)(3) and the following Tennessee Rules of Professional Conduct:

- RPC 1.1: Competence;

- RPC 1.2(d): Scope of Representation and Allocation of Authority Between Client and Lawyer;
- RPC 1.3: Diligence;
- RPC 1.4: Communication;
- RPC 3.2: Expediting Litigation;
- RPC 3.3(a)(1), (b) and/or (c): Candor Toward the Tribunal;
- RPC 3.4(a) and/or (c): Fairness to Opposing Party and Counsel;
- RPC 4.1(a) and/or (b): Truthfulness in Statements to Others; and
- RPC 8.4(c) and/or (d): Misconduct

[Doc. 46.] The Court incorporates here the relevant facts recited in the May 27 Order, none of which Mr. Roberts disputed at the hearings on June 22, 2022 ("June 22 Hearing"), and July 1, 2022 ("July 1 Hearing").[1]

The May 27 Order also directed Tyler Davis, managing attorney of Davis Law Firm, PLLC, which employed Mr. Roberts during all relevant periods, to appear and show cause why he should not be sanctioned, including but not limited to an order to self-report to the Tennessee Board of Professional Responsibility for his failure to monitor and properly supervise Mr. Roberts and for Mr. Davis's failure to create measures to prevent further misconduct in light of this Court's previous admonitions to Mr. Roberts,[2] both of which would appear to be a violation of Tennessee

[1] Both hearings were attended by Mr. Roberts; either Nick Foster or Tiffany DiIorio as counsel for the United States Trustee; Debtor's counsel, Cynthia T. Lawson; and John P. Newton, the Chapter 7 Trustee. Debtor was present for and testified at the June 22 Hearing, and Mr. Davis appeared at the July 1 Hearing.

[2] The Court previously sanctioned Mr. Roberts for failures to adequately represent his clients and for overcharging clients, and on September 30, 2021, the Court expressly counseled Mr. Roberts that his law firm partners also would be held responsible for any future misconduct. *See* Order, First Case, ECF No. 53 (Bankr. E.D. Tenn. May 7, 2021); Order, *In re Harwell*, No. 3:21-bk-30164-SHB, ECF No. 44 (Bankr. E.D. Tenn. Mar. 30, 2021); Order, *In re Pierce*, No. 3:20-bk-32062-SHB, ECF No. 51 (Bankr. E.D. Tenn. Nov. 5, 2020). Since Mr. Roberts began appearing before this Court in 2019, the Court has issued approximately nine show-cause orders to Mr. Roberts for, *inter alia*, his failures to file documents timely, to appear at hearings, or for charging excessive fees.

Rule of Professional Conduct 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers. At the Court's direction, the Clerk's office mailed a copy of the May 27 Order to Mr. Davis at his law firm's address; however, as represented by Mr. Davis in his court filing seeking a continuance on June 16, 2022 [Doc. 53], and at the July 1 Hearing, he learned of the May 27 Order only when he received an email from counsel for the United States Trustee on June 15, 2022, because Mr. Roberts took the mailed order directed to Mr. Davis and concealed from Mr. Davis the May 27 Order with the requirement for Mr. Davis to appear on June 22, 2022.[3] The Court granted Mr. Davis's motion to continue on June 17, 2022, but continued the hearing to July 1 only as to Mr. Davis. [Doc. 55.]

At the June 22 Hearing, Mr. Roberts expressly agreed to admission of Exhibit 1 tendered by counsel for the United States Trustee, consisting of text messages between Debtor and Mr. Roberts from March 31, 2022, to May 10, 2022 [Ex. 1; Doc. 51], within which Mr. Roberts was untruthful with Debtor concerning the following:

- that he had filed a motion to convert her case to Chapter 13 when he had not;
- that the supposed motion to convert had not been assigned a hearing date and could not be expedited; and
- that the Court had not ruled on the purported motion to convert[4] at the hearing held on May 5, 2022, at which the Court, in fact, granted the Chapter 7 Trustee's motion to compel Debtor to allow the Chapter 7 Trustee's realtor access to Debtor's house at Chestnut Court (the "Property") and to require anyone living with Debtor to vacate by May 31, 2022, which

[3] Mr. Roberts admitted at the June 22 Hearing that he had taken the mail directed from the Court to Mr. Davis and concealed the information from Mr. Davis.

[4] Debtor also testified, and Mr. Roberts admitted, that Mr. Roberts also informed Debtor that he had made an oral motion to convert at the May 5, 2022 hearing.

was memorialized in an order entered on May 5, 2022 ("May 5 Order") [Doc. 35]. Mr. Roberts admitted at the June 22 Hearing that he repeatedly advised Debtor to ignore and be untruthful to the realtor about gaining access to the Property, even after the May 5 Order that *compelled* Debtor's cooperation with the realtor within two days.

Debtor testified that she learned the truth about the status of her case on May 10, 2022, when she and her brother looked up her case through Pacer, read the May 5 Order, and found that Mr. Roberts, in fact, had not filed a motion to convert her case, which led Debtor to terminate Mr. Roberts on that same day. Debtor explained that she filed her bankruptcy case simply to receive the fresh start.

As to damages, Debtor testified that she had missed 12 hours of work at her $22.00 hourly rate, had paid $20.00 total for parking, had mileage of 64 miles one-way[5] between her home and the courthouse and also between her home and Ms. Lawson's office. She also testified that she paid the $338.00 filing fee in her first case, which had been filed on February 2, 2021,[6] and dismissed on May 7, 2021, because the Statement Regarding Payment Advices was not filed as required by 11 U.S.C. § 521.[7]

At the close of the June 22 Hearing, the Court advised Mr. Roberts that the matter would be under advisement pending the July 1 Hearing and detailed the sanctions that might be imposed against him, instructing him to be prepared to respond at the July 1 Hearing. The Court also directed Mr. Roberts to do the following, as memorialized in the Order entered June 23, 2022

[5] The Court notes that Debtor lives in Crossville, Cumberland County, Tennessee, for which proper venue is the Middle District of Tennessee, Cookeville Division.

[6] Case No. 3:21-bk-30162-SHB ("First Case").

[7] Debtor paid Mr. Roberts a fee of $1,300.00 for filing the First Case, which the Court ordered Mr. Roberts to disgorge for failing to properly represent Debtor. The Court also ordered Mr. Roberts to re-file a Chapter 7 case for Debtor without payment of additional compensation, including payment of the $338.00 filing fee. [First Case, Doc. 53.]

("June 23 Order"):

(1) to self-report his conduct to the Tennessee Board of Professional Responsibility and present documentary proof thereof at the July 1 Hearing;

(2) to take actions as to three identified potential clients that he was prohibited from representing, including returning any fees paid and providing each with the names and contact information for at least three bankruptcy attorneys; and

(3) to take action to ensure that any subsequent documents or actions required in five open bankruptcy cases in this district were completed.

[Doc. 61.] Also, at the June 22 Hearing, the Court directed Ms. Lawson as Debtor's counsel to submit a good-faith estimate of the time she has expended in Debtor's case, along with her hourly rate and any actual expenses, and directed the Chapter 7 Trustee to submit (1) an itemized statement of the attorneys' fees and expenses he has incurred in this case concerning the sale of the Property; (2) an estimate of his statutory commission based on potential sale of the Property; and (3) the number of hours spent by the realtor in her efforts to gain access to the Property and a reasonable hourly rate for her. [Doc. 61.]

As directed, on June 28, 2022, Ms. Lawson filed her Good Faith Estimate of Legal Services ("Good Faith Estimate"), reflecting estimated time of 11.3 hours, translating to $2,825.00 at her standard hourly rate of $250.00, plus expenses of $27.84 for her representation of Debtor between May 11 and June 24, 2022. [Doc. 63.] In his Notice of Filing, filed on June 29, 2022, the Chapter 7 Trustee included a statement of services and expenses for his firm in its capacity as trustee counsel, reflecting fees and expenses as of June 30, 2022, in the amount of $2,220.00 (5.0 hours for John Newton at his $300.00 hourly rate and 3.2 hours for Kevin Newton at his $225.00 hourly rate) plus expenses totaling $36.64. [Doc. 64.] The Notice of Filing also reflects calculations of

the Trustee's statutory commission for an actual sale of the Property ($8,417.93) and for no sale if the case had been filed after January 1, 2022 ($987.91), as well as a good-faith estimate of 4.0 hours at a $100.00 hourly rate for time expended by the realtor, Cissy Turner, in connection with this case. [Doc. 64.][8]

On June 23, 2022, Mr. Davis filed a Brief in which he made the following relevant statements:

- Mr. Roberts began accepting bankruptcy cases in early 2020, after Mr. Davis's previous firm dissolved.
- Mr. Roberts was trained by Kaitlin Justus before she left the firm.
- Mr. Davis has not practiced bankruptcy, but he believed that Ms. Justus's training was appropriate to allow Mr. Roberts to handle bankruptcy cases, given Ms. Justus's bankruptcy experience.
- Mr. Davis instructed Mr. Roberts to review many bankruptcy-related treatises and online resources and to participate in as many bankruptcy-related CLEs as possible to properly prepare him for filing cases.
- There were no obvious issues with Mr. Roberts's bankruptcy cases before the Court issued a show cause order in Case No. 3:20-bk-30162-SHB[9] on March 16, 2021, related to Mr.

[8] Notwithstanding that Mr. Roberts did not contest the information contained in the Good Faith Estimate of Legal Services or the Notice of Filing filed by Ms. Lawson and the Chapter 7 Trustee, respectively, the Court, exercising its obligation to review the appropriateness of requested fees, has reviewed the statements of services attached thereto and finds that all services reflected therein are reasonable and compensable.

[9] The docket number reflected in Mr. Davis's brief is not the correct case number for the First Case. In Debtor's First Case, an order was entered [First Case, Doc. 23], directing Mr. Roberts to appear and show cause why compensation in the amount of $1,300.00 did not exceed the reasonable value of services under 11 U.S.C. § 329(b). Because documents required by 11 U.S.C. § 521 were not filed within the statutory deadline, even after two extensions of time, after a second show-cause order was issued [First Case, Doc. 39], Debtor's case was dismissed, and Mr. Roberts was ordered to disgorge the $1,300.00 paid to him by Debtor for the case and to re-file a case for Debtor free of charge. [First Case, Doc. 53.]

Roberts's compensation. Mr. Davis subsequently directed Mr. Davis to lower his retainer amount and refunded the directed amount to the debtor.

- Mr. Davis believed, and Mr. Roberts indicated when specifically asked by Mr. Davis, that the show-cause order and hearing were solely fee-related and not performance-related and that there were no other issues before the Court.
- Mr. Davis was unaware of any further issues until his firm was served with a malpractice complaint on December 13, 2021, related to a bankruptcy case handed by Mr. Roberts.[10]
- Mr. Davis initially terminated Mr. Roberts from the firm on December 13, 2021, but decided to work with Mr. Roberts, who had had two immediate family members pass away within four months of each other and who was taking new medication to assist with his mental health.
- After receiving the malpractice complaint, Mr. Davis reviewed every retained bankruptcy case in the firm's system, verified via Pacer whether they had been filed with the Court, and instructed Mr. Roberts to get every case filed, moving forward, and/or resolved or he would be terminated.
- During early 2022, Mr. Roberts filed eight bankruptcy case, and the fees were refunded in the remaining outstanding bankruptcy client files.
- In January 2022, Mr. Davis hired a legal assistant for the sole purpose of resolving any issues related to Mr. Roberts's bankruptcy cases. The legal assistant reported directly to

[10] The bankruptcy case was *In re Harmon*, No. 3:20-bk-32296-SHB. In that Chapter 7 proceeding, the debtors' residence was sold by the Chapter 7 Trustee after their motion to convert to a Chapter 13 case was denied. [*In re Harmon*, Docs. 89, 95.] The *Harmon* case bore remarkable similarities to this case concerning the sale of the debtors' residence that might have been avoided had Mr. Roberts competently represented the debtors.

Mr. Davis multiple times each week.[11]

- The firm also purchased new bankruptcy software to make filings easier and more streamlined.[12]
- Mr. Davis believed that he put proper safeguard measures in place and began to highly monitor all bankruptcy cases to prevent further issues and that between the new software, additional staff assistance, and his new medication, Mr. Roberts would get back on track with his cases.
- Specifically in this bankruptcy case, Mr. Roberts did not give information to staff and assured him that it was filed and on course.
- Mr. Davis verified through Pacer that Debtor's case was filed.
- Mr. Roberts made numerous misrepresentations to Mr. Davis concerning his bankruptcy cases and clients. Mr. Roberts did not inform Mr. Davis that Debtor had terminated his representation in her case.
- Even though on September 30, 2021, the Court expressly instructed Mr. Roberts to inform Mr. Davis of the problems in Case No. 3:21-bk-30164-SHB,[13] Mr. Roberts did not do so.

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[11] The Court is perplexed that after receiving a malpractice complaint, Mr. Davis would consider the hiring of a legal assistant with no bankruptcy experience as the solution for what should have been evident as a defect in Mr. Roberts's substantive (not merely procedural) bankruptcy practice.

[12] Indeed, notwithstanding the problems with Mr. Roberts's bankruptcy practice evidenced by the malpractice complaint against him, the pace of his case filings increased significantly after the complaint was received, with eight cases filed in the first four months of 2022 when only six cases had been filed by Mr. Roberts in all of 2021.

[13] Mr. Roberts filed that case on behalf of Debtor Rebecca S. Harwell and was directed through an Order entered March 30, 2021 [Doc. 44], to disgorge $450.00 of the fee paid to him by Debtor because it exceeded the reasonable value of services under § 329(b). Mr. Davis's reference to the *Harwell* case is irrelevant because it was not the subject of the referenced September 30, 2021 hearing. The September 30, 2021 hearing was the culmination of numerous problems in the Chapter 7 case of Tina K. Thompson, Case No. 3:21-bk-30195-SHB. Mr. Roberts and his firm had overcharged Ms. Thompson [*see In re Thompson*, Doc. 42]; he had missed a hearing on July 8, 2021, without communicating with the Chapter 7 Trustee or the Court [*see In re Thompson*, Doc. 62]; and the debtor and Mr. Roberts had failed to appear at a Rule 2004 exam and Mr. Roberts had failed to communicate with the Chapter 7 Trustee, resulting in a motion for contempt against the debtor [*see In re Thompson*, Doc. 82]. At the September 30, 2021 hearing, Mr. Roberts told the Court that he had been out for two weeks with COVID-19, followed immediately by his

- Mr. Davis does not have access to Mr. Roberts's personal cell phone, from which the text messages between Mr. Roberts and Debtor occurred.
- Mr. Roberts received a telephone call from the United States Trustee's office on December 15, 2021, requesting that Debtor's case be refiled.
- Mr. Roberts concealed the May 27 Order that was received by mail at their office on May 31, 2022.
- The May 27 Order is the only other show-cause order that Mr. Davis was made aware of; he learned about the order after receiving it by email from counsel for the United States Trustee. Once it was received, Mr. Davis took immediate action in attempts to resolve the underlying issues and participate in the evidentiary hearing.
- Mr. Davis does not condone Mr. Roberts's actions with Debtor, which have put Mr. Roberts's employment with the firm in peril pending the Court's determination.

[Doc. 60.]

At the beginning of the July 1 Hearing, Mr. Roberts advised the Court that he had self-reported his conduct to the Tennessee Board of Professional Responsibility [*see* Ex. 2] and that he had complied with the remaining directives of the June 23 Order concerning existing and potential bankruptcy clients. At the Court's inquiry, Mr. Roberts informed the Court of the specific status for each open bankruptcy case, and he represented that he had complied with the Court's directives concerning the "three" clients who were awaiting the filing of a bankruptcy case.

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assistant being out after her daughter's daycare closed for COVID; that his father had passed away on July 19, 2021; and that he had been with his father who was in the hospital on July 8, 2021, when he missed the July 8 hearing without communicating with the Chapter 7 Trustee or the Court. The Court acknowledged Mr. Roberts's personal issues but admonished him about not properly assisting his clients and advised him to let the attorneys in his firm know what was going on and share his files with them so that they could step in and assist him by showing up in court, asking for a continuance, and/or calling opposing counsel, irrespective of whether they practice in bankruptcy. The Court also advised Mr. Roberts that if there were any additional issues in his cases, he would be sanctioned and the firm would also be called to account for his problems. The Court has not ordered Mr. Roberts to obtain a transcript of the September 30 hearing; however, the Court maintains the audio record.

Mr. Roberts told the Court that when fees were repaid at the Court's direction in prior cases, the law firm had refunded the fees to clients, with Mr. Roberts then repaying the law firm but that he and Mr. Davis had no discussion that some of the fees were disgorged because of problems with Mr. Roberts's representation of firm clients. Mr. Roberts also stated that he had no opposition to the Good Faith Estimate and Notice of Filing filed by Debtor's counsel and the Chapter 7 Trustee, nor did he oppose the imposition of sanctions against him for his misconduct and violations of the ethical rules.

For his statement at the July 1 Hearing, Mr. Davis acknowledged that he was Mr. Roberts's supervising attorney but stressed that he knew nothing about bankruptcy law. He told the Court that Mr. Roberts initially worked with Ms. Justus, who was also an associate for approximately six months after Mr. Roberts joined the firm that was the predecessor to Mr. Davis's current firm, and that Ms. Justus later left the firm.[14] Concerning his knowledge about Mr. Roberts's issues with his bankruptcy clients and the various show-cause orders from the Court, Mr. Davis stated that his firm refunded Debtor's fees in her First Case but (notwithstanding Mr. Roberts's statements at July 1 Hearing), it had not refunded fees in any other bankruptcy cases, and he had been unaware that Mr. Roberts was required to disgorge or refund fees in any other cases. Mr. Davis also stated that Mr. Roberts assured Mr. Davis that he was keeping up with bankruptcy law but admitted that he did not follow up on the CLE topics taken by Mr. Roberts and the firm had not paid for any bankruptcy-related CLEs for Mr. Roberts. When questioned by the Court about what steps he took after receiving the malpractice complaint, Mr. Davis stated that he (1) ran a Pacer search to verify

[14] The Court takes judicial notice from the Tennessee Board of Professional Responsibility's website that Ms. Justus was licensed in 2017, Mr. Roberts was licensed in 2014, and Mr. Davis was licensed in 2015. Per a search on CM/ECF, Ms. Justus has filed a total of 16 cases in this Court, all between December 3, 2018, and August 14, 2020, and all while she was practicing at Mr. Davis's former firm, Griffin & Davis, PLLC. Mr. Roberts began filing cases on March 26, 2019, which was approximately three months after Ms. Justus filed her first and only case in this Court at that time.

that Mr. Roberts had filed the cases for clients who had already engaged the firm; (2) hired a legal assistant who reported directly to him about the status of Mr. Roberts's cases but acknowledged that the legal assistant had no bankruptcy experience; and (3) took away the other types of cases that Mr. Roberts was working on, such as probate cases, to allow Mr. Roberts more time to devote to his bankruptcy cases but did not provide or require additional bankruptcy-related training for Mr. Roberts.

Mr. Davis also advised the Court that the firm did not file Chapter 13 cases and, instead, referred them out, but he had no answer for the Court's questions concerning whether Mr. Roberts or anyone in the firm was properly counseling clients when they might need to file a Chapter 13 case rather than a Chapter 7 case. It appears that Mr. Roberts simply filed only Chapter 7 cases for clients without any discussion or consideration of the implications of Chapter 7 versus Chapter 13.

I. SANCTIONING AUTHORITY

A. 11 U.S.C. § 526

The Bankruptcy Code defines a debt relief agency as "any person[[15]] who provides any bankruptcy assistance to an assisted person[[16]] in return for the payment of money or other valuable consideration[.]" 11 U.S.C. § 101(12A). Restrictions on debt relief agencies are outlined in 11 U.S.C. § 526 as follows:

> (a) A debt relief agency shall not–
>
> (1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

[15] "The term 'person' includes individual, partnership, and corporation[.]" 11 U.S.C. § 101(41).

[16] "The term 'assisted person' means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $204,425[.]" 11 U.S.C. § 101(3).

> (2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;
>
> (3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to--
>
> (A) the services that such agency will provide to such person; or
>
> (B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or
>
> (4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. § 526(a).

A debt relief agency's failure to comply with the provisions of subsection (a) are subject to the following provisions of subsection (c):

> (c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, . . . shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.
>
> (2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have--
>
> (A) intentionally or negligently failed to comply with any provision of this section . . . with respect to a case or proceeding under this title for such assisted person;
>
> (B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or
>
> (C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

> . . . .
>
> (4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).
>
> (5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may--
>
> (A) enjoin the violation of such section; or
>
> (B) impose an appropriate civil penalty against such person.

11 U.S.C. § 526(c).

B. 11 U.S.C. § 105(a)

In addition to the authority granted by § 526(c), this Court is authorized to sanction abusive or bad faith conduct by 11 U.S.C. § 105(a), which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]," including taking sua sponte action "to enforce or implement court orders or rules or to prevent an abuse of process[,]" and through the "'inherent power' [possessed by the federal courts], not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases . . . [including] 'the ability to fashion an appropriate sanction for conduct which abuses the judicial process.'" *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186-87 (2017) (holding that a court may sanction bad faith conduct based on the "but-for test" by ordering payment of the fees that the innocent party would not have incurred "but for" the misconduct); *see also Law v. Siegel*, 571 U.S. 415, 420-21 (2014) (recognizing the statutory authority provided by § 105(a) to carry out the Bankruptcy Code's provision as well as the court's co-existing but separate inherent sanctioning powers to further uphold the provisions of the Code).

II. FINDINGS AND SANCTIONS

Unquestionably, Mr. Roberts and Davis Law Firm, LLC fall within the Bankruptcy Code's definition of debt relief agency and, thus, are subject to the restrictions of § 526(a) and the sanction provisions of § 526(c). The record before the Court clearly reflects, at a minimum, the following violations of § 526(a) in Debtor's First Case and this case:

- Mr. Roberts did not advise Debtor in either her First Case or this case that her home could be sold in a Chapter 7 bankruptcy case;
- Mr. Roberts did not file the Statement Regarding Payment Advices required by 11 U.S.C. § 521(a)(1)(B)(iv) and Federal Rule of Bankruptcy Procedure 1007(b) within the time required by § 521(i), resulting in dismissal of Debtor's First Case on May 7, 2001;
- Mr. Roberts did not advise Debtor that her basic statutory homestead exemption would increase from $5,000.00 to $35,000.00 if she waited to file this case until after January 1, 2022;
- Mr. Roberts told Debtor that the Chapter 7 Trustee was merely doing due diligence after the Trustee advised Debtor at her 2004 examination on March 29, 2022, that he was going to sell her home;
- Mr. Roberts repeatedly directed Debtor to avoid communication with and to provide false information for such avoidance to the Chapter 7 Trustee's realtor;
- Mr. Roberts repeatedly promised to communicate with Debtor without following up;
- Mr. Roberts expressly told Debtor that he had filed a motion to convert this case to Chapter 13 when he had not;
- Mr. Roberts misrepresented information concerning the Court's calendar with respect to the non-existent motion to convert; and

- Mr. Roberts did not advise Debtor that the Court had granted the Chapter 7 Trustee's motion to compel her cooperation with the realtor as directed in the May 5 Order.

Mr. Roberts has not refuted or contested any of the testimony at either the June 22 Hearing or the July 1 Hearing, and he advised the Court at the July 1 Hearing that he agrees with the sanctions that the Court intended to impose against him.

Mr. Davis, however, did not agree that he or his firm violated any ethical rules or obligations or that he or the firm should be sanctioned for Mr. Roberts's violations and misconduct. The Court, however, disagrees and finds that Mr. Roberts's repeated conduct together with Mr. Davis's and Davis Law Firm, LLC's failure to properly ensure that their clients were being represented competently and ethically reflect "a clear and consistent pattern or practice of violating [§ 526]" as well as a violation of the Tennessee Rules of Professional Conduct.

Rule 5.1, entitled Responsibilities of Partners, Managers, and Supervisory Lawyers, and its Comment provide:

> (a) A partner in a law firm, 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 all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> > (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> >
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. *See* RPC 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. *See* RPC 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. *See also* RPC 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in a negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension. This duty is

> in addition to the lawyer's RPC 8.3(a) duty to report professional misconduct to the Office of Disciplinary Counsel. The obligation to take reasonable remedial action, however, does not require the lawyer to take any action that would violate these Rules, e.g., disclosing information related to the representation of a client in violation of RPC 1.6. Nor does the duty to mitigate harm require the lawyer to compensate a person for losses suffered by virtue of the misconduct the lawyer knows has occurred.
>
> [6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.
>
> [7] Apart from this Rule and RPC 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules. This Rule is only intended to provide a basis for professional discipline and is not intended to alter the legal rights and responsibilities of partners or supervisory lawyers with respect to the conduct of other lawyers with whom they are associated.
>
> [8] The duties imposed on managing and supervising lawyers by this Rule do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct.

Tenn. Sup. Ct. R. 8, RPC 5.1.

At the July 1 Hearing, Mr. Davis acknowledged that he was Mr. Roberts's supervising attorney at all relevant times. Nevertheless, Mr. Davis did not monitor Mr. Roberts before the malpractice claim was filed in December 2021, and even thereafter, his safeguarding measures were insufficient. It was not enough for Mr. Davis to verify through a Pacer search that Mr. Roberts was filing cases for clients who had engaged the firm. Nor was it enough for Mr. Davis to hire a legal assistant (wholly inexperienced in bankruptcy law) to report directly to Mr. Davis as to Mr. Roberts's cases. Likewise, it was not enough to remove from Mr. Roberts's responsibility other types of cases to allow him additional time to devote to bankruptcy cases because Mr. Davis's actions did not ensure that Mr. Roberts was competently representing the firm's bankruptcy clients through numerous possible options, including additional education or requiring Mr. Roberts to find a mentor experienced in bankruptcy law. Indeed, Mr. Davis failed to ensure that Mr. Roberts

received any sort of actual instruction in bankruptcy law beyond the initial training provided in 2019 by Ms. Justus, who been licensed for only two years and had filed only one case in this Court a mere three months before Mr. Roberts filed his first case.

Additionally, although some of the declarations made by Mr. Davis in his Brief and at the July 1 Hearing were incorrect, such as his statement that Mr. Roberts began filing bankruptcy cases in 2020 even though Mr. Roberts filed his first case in this district on March 26, 2019, the Court does not believe that the statements were purposely inaccurate or misleading, but they do provide more evidence of Mr. Davis's lack of awareness – and his lack of regard – for Mr. Roberts's representation of bankruptcy clients on behalf of Mr. Davis's firm. The Court finds that Mr. Davis's failure to adequately supervise Mr. Roberts contributed to the substantive failures and chaos now surrounding Mr. Roberts's practice. Accordingly, the Court will require Mr. Davis to self-report this matter to the Tennessee Board of Professional Responsibility for investigation and a determination of whether Mr. Davis has violated any Rules of Professional Conduct.

For the foregoing reasons and as stated on the record at the July 1 Hearing, the Court finds and directs as follows:

1. Christopher Shawn Roberts has engaged in misconduct and misrepresentations in this case in violation of 11 U.S.C. § 526(a)(3) and Tennessee Rules of Professional Conduct 1.1, 1.2(d), 1.3, 1.4, 3.2, 3.3(a)(1), 3.3(b), 3.3(c), 3.4(a), 3.4(c), 4.1(a), 4.1(b), 8.4(c), and 8.4(d). As sanctions for his conduct, the Court directs:

   a. Mr. Roberts is suspended from accepting any new representation of clients seeking advice concerning bankruptcy or the filing of a case in the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, pending resolution of his self-report to the Tennessee Board of Professional Responsibility. Mr.

Roberts shall immediately decline representation of any such prospective client and provide such prospective client with the names of at least three attorneys experienced in bankruptcy practice;

b. Mr. Roberts shall attend a total of 30 hours of continuing legal education, 20 of which must be ethics and 10 of which must be in bankruptcy law,[17] the completion of which must be certified to this Court before he may be reinstated from his suspension to practice before this Court;

c. Mr. Roberts shall request from the Court's transcriptionist transcripts from the court proceedings on May 5, 2022, June 22, 2022, and July 1, 2022, no later than close of business on July 22, 2022, with payment of associated fees being made within 7 days of invoicing;

d. Within 5 days after receipt of the transcripts required to be obtained above, Mr. Roberts shall file a supplemental report with the Tennessee Board of Professional Responsibility that includes a copy of this Order and the transcripts for the May 5, June 22, and July 1 Hearings;

e. Within 60 days from the date of this Order, Mr. Roberts shall pay the following:

- $771.76 as actual damages ($264.00 in lost wages; $20.00 for parking; mileage of $149.76; and $338.00 for the filing fee in her First Case) to Debtor, payable to Amy Hecker and mailed to Ms. Lawson at Cindy Lawson & Associates, P.C., 6704 Watermour Way, Knoxville, Tennessee 37912;

- $2,852.84 as actual damages for attorneys' fees and expenses

[17] To the extent that any CLE counts as dual credit for both bankruptcy and ethics, such hours may only be attributed to one or the other to achieve the total 30 hours.

incurred by Debtor's substitute counsel, payable to Cynthia T. Lawson and mailed to Cindy Lawson & Associates, P.C., 6704 Watermour Way, Knoxville, Tennessee 37912;

- $2,256.64 as actual damages for attorneys' fees and expenses incurred by the Chapter 7 Trustee, payable to Mayer & Newton and mailed to John Newton at the Law Offices of Mayer & Newton, 1111 Northshore Drive, Suite S-570, Knoxville, Tennessee 37919;

- $987.91 as actual damages for the lost statutory trustee commission, payable to John Newton, Trustee, and mailed to Mr. Newton at the Law Offices of Mayer & Newton, 1111 Northshore Drive, Suite S-570, Knoxville, Tennessee 37919; and

- $400.00 as actual damages incurred by the Chapter 7 Trustee's realtor, payable to Cissy Turner and mailed to Mr. Newton at the Law Offices of Mayer & Newton, 1111 Northshore Drive, Suite S-570, Knoxville, Tennessee 37919; and

f. Mr. Roberts shall file, within 60 days from the date of this Order, a certification under penalty of perjury, which shall comply with E.D. Tenn. LBR 5005-4(h)(2), that he has fully satisfied the payment requirements above.

2. Tyler Davis, as managing attorney of Davis Law Firm, LLC, has violated Tennessee Rule of Professional Conduct 5.1 for failing to properly monitor and supervise Mr. Roberts and for failing to establish sufficient safeguards to prevent the misconduct and incompetence of Mr. Roberts. As a sanction, Mr. Davis shall, within 15 days from entry of this Order, self-report to the Tennessee Board of Professional Responsibility by providing a copy of

this Order, the May 27 Order, and the June 23 Order.

3. Pursuant to 11 U.S.C. § 526(c)(5), the Court finds that the Davis Law Firm, LLC, is jointly and severally liable for all monetary sanctions imposed herein. Should Mr. Roberts fail to make the payments required by this Order to Debtor, Ms. Lawson, Mayer & Newton, Mr. Newton, and/or Ms. Turner within 60 days from the date of this Order, which failure will be evidenced by the failure of Mr. Roberts to file the certification under penalty of perjury as ordered herein, Davis Law Firm, LLC shall satisfy any remaining payment obligation(s) within 30 days thereafter and shall file a notice of satisfaction with the Court within two business days of such payment(s).

4. Failure of Mr. Roberts, Mr. Davis, and/or Davis Law Firm, LLC to satisfy any requirements of this Order could result in the imposition of additional sanctions.

5. Copies of this Order shall be mailed by the Clerk to Mr. Roberts and Mr. Davis individually at Davis Law Firm, PLLC, 804 West Race Street, Kingston, Tennessee 37763.

###

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 512 **July 29, 2024**

Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.[1] A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.[2] GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

[1] There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).

[2] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.[3] What level of competency should lawyers acquire regarding a GAI tool? How can lawyers satisfy their duty of confidentiality when using a GAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a GAI tool to clients? What level of review of a GAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a GAI tool to provide legal services to clients?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.[4] It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

II. Discussion

A. Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.[5] This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.[6] Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[7]

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations

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[3] Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

[4] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), Model Rule 1.7 ("Conflict of Interest: Current Clients"), and Model Rule 1.9 ("Duties to Former Clients"). *See, e.g.*, Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Philadelphia Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) ("Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another."). Accordingly, lawyers should consider all rules before using GAI tools.

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

[6] MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012).

[7] MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.[8] This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.[9] Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.[10]

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.[11] One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.[12] Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.[13] Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.[14]

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

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[8] Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

[9] *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

[10] MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

[11] As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

[12] *See,* W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

[13] *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

[14] Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), *available at* https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.[15] While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.[16] Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.[17] Over time, other new technologies have become integrated into conventional legal practice in this manner.[18] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how

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[15] *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[16] *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[17] *See, e.g.*, Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), *available at* https://ssrn.com/abstract=3485055 ("View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.").

[18] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*") (emphasis added); Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have "become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant").

to use email or create an electronic document."[19] Similar claims might be made about other tools such as computerized legal research or internet searches.[20] As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.[21] But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,[22] lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.[23] As previously noted regarding the possibility of outsourcing certain work, "[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary 'legal knowledge, skill, thoroughness and preparation.'"[24] Ultimately, any informed decision about whether to employ a GAI tool must consider the client's interests and objectives.[25]

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[19] ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

[20] *See, e.g.*, Bradley, *supra* note 17, at 3 ("Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of 'methods and procedures' used by competent lawyers."); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) ("The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice"); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) ("While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means."); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) ("This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both"); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) ("Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.").

[21] *See* MODEL RULES R. 1.1 cmt. [5] (stating that "[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners"); New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

[22] The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

[23] Model Rule 1.5's prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

[24] ABA Formal Op. 08-451, *supra* note 15, at 2. *See also id.* ("Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.").

[25] MODEL RULES R. 1.2(a).

B. Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by an exception.[26] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[27]

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,[28] the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.[29]

Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others *inside* the firm who will not adequately protect the information from improper disclosure or use[30] because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.[31]

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,[32] even if the tool is used exclusively by lawyers at the same firm.[33] This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

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[26] MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].
[27] MODEL RULES R. 1.6(c).
[28] ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when … the nature of the information requires a higher degree of security.").
[29] MODEL RULES R. 1.6, cmt. [18].
[30] *See* MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.
[31] *See* ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).
[32] *See generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.
[33] *See* Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.[34]

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.[35]

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.[36] As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.[37] Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

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[34] This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), *available at* http://www.wvodc.org/pdf/AILEO24-01.pdf.

[35] *See* W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

[36] Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

[37] Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI,* BLOOMBERG LAW ANALYSIS (June 16, 2023, 4:00 pm), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7.

C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."[38] Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.[39] There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.[40] For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.[41] Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.[42]

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,[43] such as when a lawyer relies on GAI

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[38] Baker v. Humphrey, 101 U.S. 494, 500 (1879).

[39] *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

[40] *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

[41] See section B for a discussion of confidentiality issues under Rule 1.6.

[42] See section F for a discussion of fee issues under Rule 1.5.

[43] Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2–3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.[44]

D. Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.[45] Rule 8.4(c) provides that a

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lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

[44] For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

[45] MODEL RULES R. 3.3(a) reads: "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; (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

lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.[46]

Some courts have responded by requiring lawyers to disclose their use of GAI.[47] As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,[48] and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.[49] These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools.[50] Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,[51] including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.[52] Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

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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."

[46] *See* DC Bar Op. 388 (2024).

[47] Lawyers should consult with the applicable court's local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

[48] *See* MODEL RULES R. 1.0(c) for the definition of firm.

[49] ABA Formal Op. 08-451, *supra* note 15.

[50] MODEL RULES R. 5.1.

[51] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[52] *See generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.[53] These opinions note the importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer's use of a GAI tool that requires the disclosure and storage of information relating to the representation.[54] In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that lawyers should:

- ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;[55]
- investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;[56]
- determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;[57] and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.[58]

F. Fees

Model Rule 1.5, which governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

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[53] ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.
[54] *See* ABA Formal Op. 08-451, *supra* note 15.
[55] Fla. Bar Advisory Op. 12-3 (2013).
[56] *Id.* citing Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].
[57] Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.
[58] Fla. Bar Advisory Op. 12-3, *supra* note 55; *See generally* Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.[59] Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf."[60] If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[61] because "[t]he client should only be charged a reasonable fee for the legal services performed."[62] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[63]

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.[64] For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. "A fee charged for which little or no work was performed is an unreasonable fee."[65]

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

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[59] The listed considerations are (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (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.

[60] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

[61] *Id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *See, e.g.*, *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

[65] Att'y Grievance Comm'n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of $1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.[66] Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.[67] At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[68] Formal Opinion 93-379 noted, "[i]n the absence of disclosure to a client in advance of the engagement to the contrary," such overhead should be "subsumed within" the lawyer's charges for professional services.[69]

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer's use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for "photocopying, computer research, . . . and similar items" rather than absorbing these expenses as part of the lawyers' overhead as many lawyers would do.[70] For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as $0.15 per page. Absent an advance agreement, the lawyer "is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator)."[71]

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[66] ABA Formal Op. 93-379 at 7.
[67] *Id.* at 8.
[68] *Id.* at 7.
[69] *Id.*
[70] *Id.* at 8.
[71] *Id.* Opinion 93-379 also explained, "It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] explains that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[72] Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.[73] Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

III. Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

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[72] MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

[73] Heavener v. Meyers, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re* Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client."); *In re* Hellerud, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of $5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law").

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

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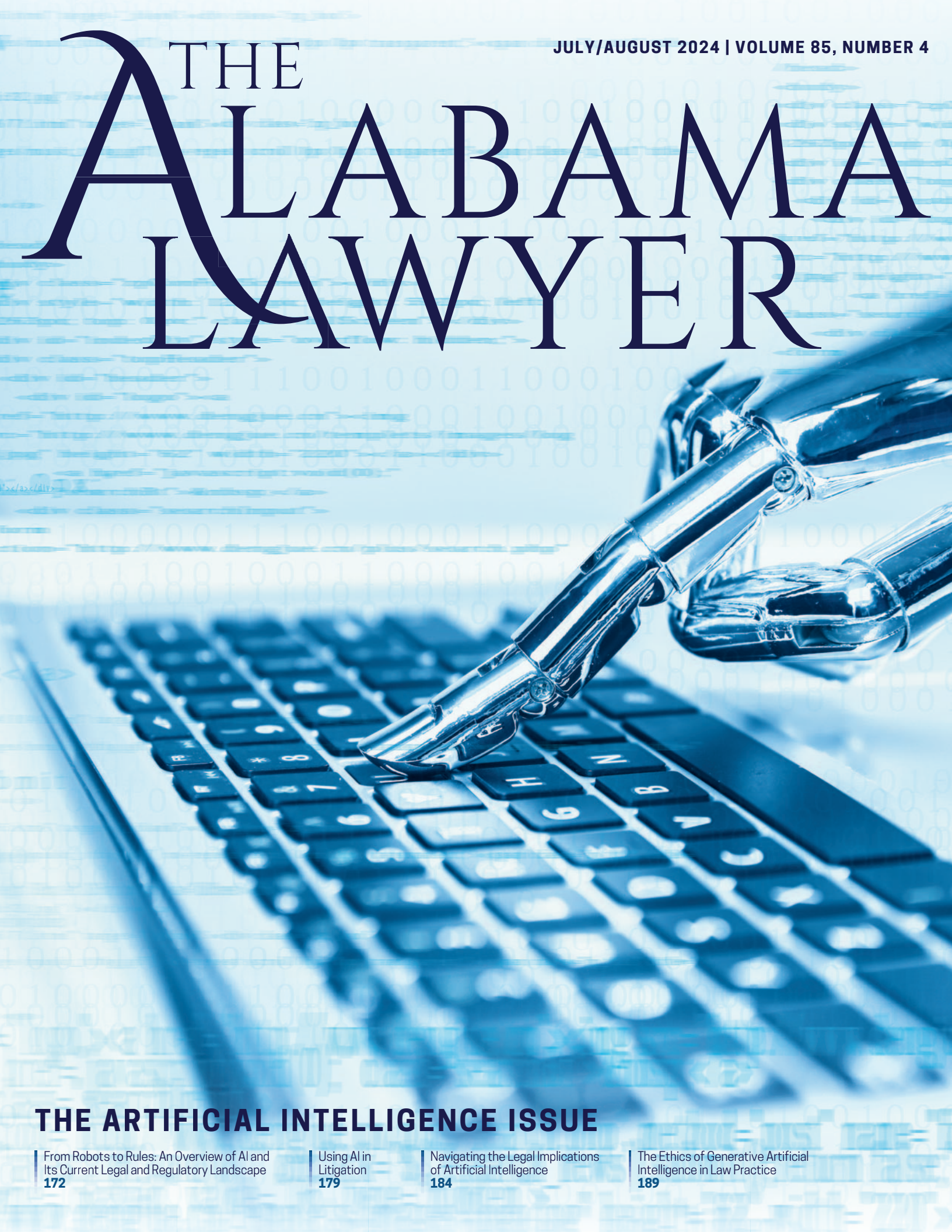

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On The Cover

Featuring a robotic hand poised over a keyboard, the cover symbolizes the ever-evolving realm of AI and its significant impact on the legal field.

Designed by Olivia Walker, Alabama State Bar

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Brannon J. Buck
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Are We Better Off Today Than We Were a Year Ago?

The title of this column poses a question, "Are we better off today than we were a year ago?" We often ask it of ourselves as we close out a calendar year. Politicians tend to ask some form of this question to likely voters. And as I pass the gavel to President Tom Perry (who will undoubtedly take the bar to higher and better places), I ask it of myself.

In July 2023, I began the year as president of the Alabama State Bar with one overriding goal – to make a positive contribution to the legal profession. To that end, we launched two initiatives. The first, ***Choose Civility***, focused on lawyers. The second, ***Justice for All***, focused on the public. But these two initiatives tell only a fraction of the story.

Through ***Choose Civility***, we reached thousands of Alabama lawyers, multiple times, with messaging and lessons about the importance of re-establishing civility and collegiality as the culture of our bar. My fear in July of last year when we launched this campaign was that it would be met with despair. After all, bar associations have been preaching civility, collegiality, and professionalism for decades.

But my hunch was that, in this new environment where we spend more time working and communicating remotely than ever before, we need to renew our focus on civility and mutual respect. And you all agreed. Countless people have told me how thankful they are that the state bar is reminding our members to be courteous and to show each other just a bit of grace. The messaging has broken through, and many of us are now hearing a quiet voice that reminds us to practice law with civility.

The ***Justice for All*** project took most of the year to develop but will, I believe, make a lasting contribution to the access to justice effort in Alabama. Born from the reality that there are nearly one million Alabamians who cannot afford a lawyer and don't know where to turn for basic legal assistance, we designed and recently launched ***Justice4AL.com*** – a new website that serves as a one-stop-shop for legal aid and access to justice resources. It will be the virtual courthouse door to Alabama's legal system for those in need.

You will grow accustomed to seeing the ***Justice4AL.com QR Code*** in courthouses all over our state. People searching for help with a legal problem can simply scan the QR code and easily navigate the prompts on the website to find the assistance they need. Our hope is that all of you, our state bar members, will refer people to ***Justice4AL.com*** when you are unable to help someone yourself.

While ***Choose Civility*** and ***Justice for All*** were highlights, we did a lot more. For starters, we connected with our members in new and different ways. We hosted ***OutREACH*** events in Brewton, Jasper, Rainsville, Demopolis, and Montgomery. These regional conferences provided five hours of CLE credit, including a local bench and bar lunch panel, for hundreds of lawyers who typically do not attend our annual meeting. Attendees learned not only about this year's two initiatives, but also about the state bar's various member programs and benefits that often get overlooked. Be on the lookout for an ***OutREACH*** event in your area next year.

This past year also witnessed the revitalization of the Litigation Section, the Criminal Law Section, and the IP, Entertainment, and Sports Law Section. In addition, the Bench and Bar Committee hosted an enormously successful online CLE that was attended virtually by over 200 lawyers. During Pro Bono Month and Law Week, hundreds of our members spent thousands of volunteer hours in service to the public. And in January, we held our State Bar Leadership Conference where we brought together the officers and directors of bar associations and legal non-profits from all over the state for a day of education and collaboration.

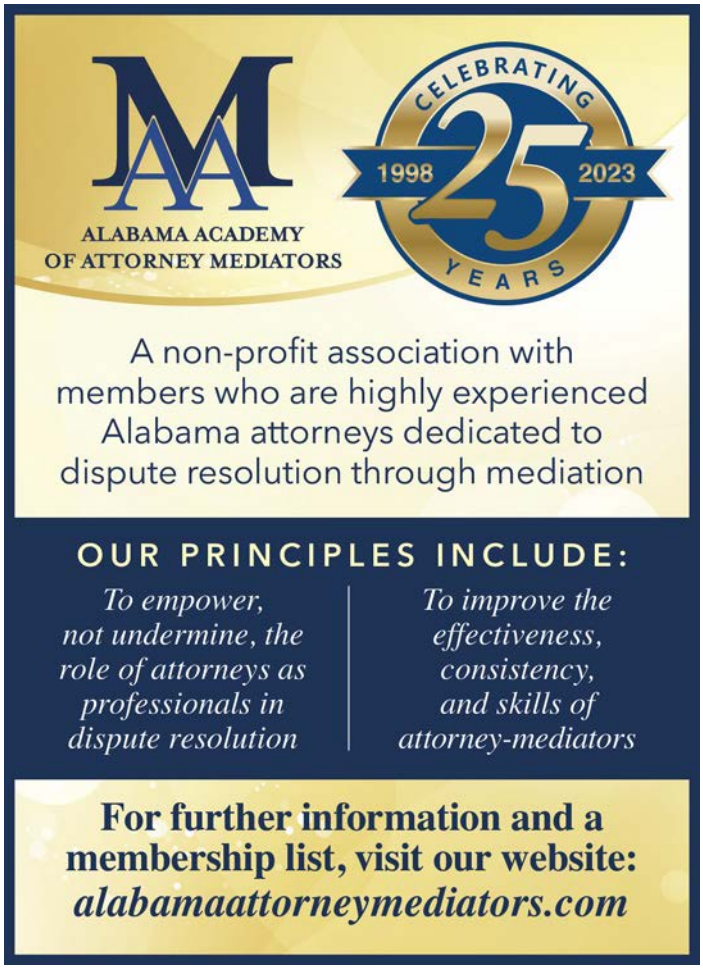
These are just a few of the ways the Alabama State Bar made a positive impact this past year. We forget, though, how much our bar contributes to the profession *every year*. The list is exhausting – two bar exams, ethics advice, rules enforcement, the Volunteer Lawyers Program, Free Legal Answers, the Lawyer Assistance Program, Law Practice Management, insurance benefits, mental health counseling, specialization, legislative updates, the Client Security Fund, the Lawyer Referral Service, Leadership Forum, the Lawyers Hall of Fame, and so many others. Then, there are the active sections and committees which, in turn, offer countless more benefits to our members.

This work – the work of the Alabama State Bar – is critically important. Many of us take for granted that the law license we worked so hard to earn would be meaningless without a regulated profession. For 100 years, our state bar has filled that regulatory function, and its success has depended, primarily, on the volunteer service of our members. Self-regulation is a privilege. We will retain that privilege only if we are good stewards of the profession and we regulate ourselves effectively and with integrity.

So, thank you! Thank you to everyone who volunteers time and energy to support our mission. And thank you to our state bar staff who so ably assist us in this endeavor. It would be impossible to name every individual who has made a meaningful contribution this year. But please know that the profession is quietly grateful for your service.

So, in the end, I hope and believe that the answer is yes – because of the work of so many of you, we are better off as a profession today than we were a year ago.

It has been the honor of my career to serve as president of the Alabama State Bar. Thank you for giving me the opportunity. ▲



EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
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Celebrating Leadership at the Alabama State Bar

Summertime always brings change to the Alabama State Bar. At our annual meeting, we bid farewell to our outgoing president and welcome a new one, along with a fresh set of elected and appointed leaders. It's a brief moment for reflection and gratitude and a pause before diving back into the year's work.

Looking back on Brannon Buck's tenure as our 148th president, his achievements are remarkable. From organizing five OutREACH CLE events statewide to launching the ***Justice4AL.com*** website and promoting civility, Brannon's dedication never wavered. Those who have worked alongside him know that professionalism isn't just a concept – it's woven into every interaction with Brannon. He exemplifies collegiality and respect, setting a standard that elevates our entire legal community.

Brannon's legacy extends beyond his presidency, particularly through his foundational work on our bylaws. His tireless efforts before and during his term will ensure a robust foundation for future generations of Alabama lawyers. His leadership style, characterized by humility and a focus on continuous improvement, embodies true service.

It has been a pleasure working with Brannon this year. His energy and dedication have been contagious, and we are grateful for his leadership. Thank you, Brannon, for your vision and commitment.

As we welcome our 149th president, Tom Perry, we look forward to the year ahead. Tom is a seasoned leader within our bar, known not only for his ability to lighten any room with laughter but also for his deep commitment to helping and serving others.

Hailing from the "metropolis of Demopolis," as he fondly calls it, Tom brings a unique perspective shaped by his understanding of life and legal career opportunities in rural Alabama. He is passionate about bridging the legal gap and enhancing access to justice statewide. Tom's warmth and dedication to people are matched only by his infectious personality – we are fortunate to have him leading us.

We have an exciting year ahead, and it has already begun! ▲

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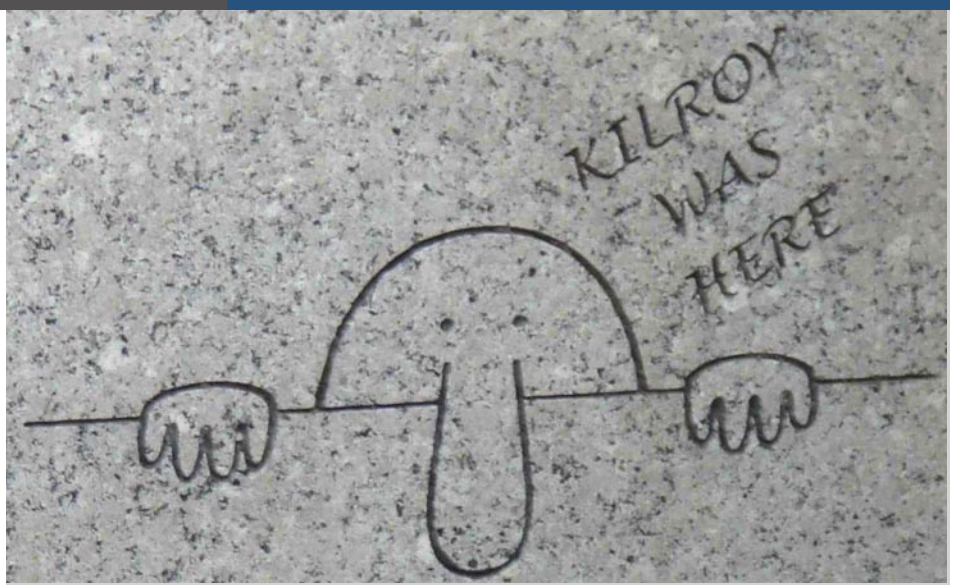

Mr. Roboto, Meet Mr. Rahimi

You're wondering who I am (secret secret; I've got a secret)
Machine or mannequin (secret secret; I've got a secret)
With parts made in Japan (secret secret; I've got a secret)
I am the modern man*
**In Dennis DeYoung's voice, it's pronounced "modren"*

In 1983, the band Styx (with Alabamian Tommy Shaw on guitar) pressed a protest album, "Kilroy Was Here," a rock opera raging against perceived theocratic repression (embodied in then-recent legislative action requiring the disclosure of "backmasking," wherein hidden messages were engraved in the reverse-playing of vinyl albums). In Kilroy's desolate dystopia, the Majority for Musical Morality (MMM) has outlawed rock, and the protagonist **R**obert **O**rin **C**harles **K**ilroy has been imprisoned, guarded 24-7 by robots. In the album's opener "Mr. Roboto," Kilroy escapes with the help of a robot, by assuming the mask and the body of the robot.

The lead-in is a paean to Mr. Roboto's liberating power (Japanese in romanization, with English subtitles):

Domo arigato, Mr. Roboto (thank you very much)
Domo arigato, Mr. Roboto (thank you very much)
Mata au hi made (Until we meet again)

Domo arigato, Mr. Roboto (thank you very much)
Himitsu o shiritai (I want to know the secret)

It begs the question of the song: What is the "secret"?

In MMM's economy, robots provide only sub-menial labor. Thus, as he is freed, Kilroy sings this encomium to his metallic master:

Thank you very much, Mr. Roboto
For doing the jobs nobody wants to
And thank you very much, Mr. Roboto
For helping me escape to where I needed to
Thank you, thank you, thank you
I want to thank you, please, thank you, oh yeah

Performing "the jobs ***nobody wants to***," and "***helping me*** escape where I needed to" – that is the robot's role. But we humans have taken it all too far, and thus the singer laments:

The problem's plain to see, ***too much technology***
Machines to save our lives, ***machines dehumanize***

But ultimately the singer has escaped his confinement, and thus –

The time has come at last (secret secret I've got a secret)
To throw away this mask (secret secret I've got a secret)
Now everyone can see (secret secret I've got a secret)
My true identity…

So what was the prisoner's true identity? DeYoung screams as the track closes: *I'm Kilroy! Kilroy! Kilroy!* Yes, it's Kilroy: that anonymous liberator scrawled by Allied troops upon Europe's walls as town upon town was freed in the 1940s. You see it in the art at the top of this piece, just as it – or it is as he? - appears at the National WWII Memorial (thanks for the pic, Wikipedia). Both liberator and liberated are the everyman.

*****

The last thing anyone (other than he himself) wanted was for Zackey Rahimi to have guns. He had battered his child's

(Continued from page 169)

mother during a lunch date, then shot at Mom as she fled. Mom got a restraining order – entered with Rahimi's consent – finding he had committed "family violence" and was a continuing threat to Mom and Child, and (among other relief) suspending his gun license for two years. Later, he violated that order by threatening Mom additional times, then was charged with aggravated assault of another woman (with a deadly weapon, no less), and later became a suspect in five additional shootings. Police obtained a warrant and searched his home, where they found guns and ammo, even along with a copy of the order. (Can't make that up.) When Rahimi was charged under 18 U.S.C. 922(g)(8), which prohibits possession of a firearm while being the subject of a domestic violence order, he claimed a Second Amendment right to keep and bear his arsenal.

Second Amendment law is constitutional white dog. *Heller v. District of Columbia,* 554 U.S. 570 (2008) marked the start, only 16 years ago. Two years later came Fourteenth Amendment incorporation in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Then came *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U. S. 1 (2022), under which a State regulation of firearms is deemed valid only if it is consistent with the "Nation's historical tradition of firearm regulation." That "historical tradition" test, penned by Justice Thomas, garnered *six* votes – so it's on *terra firma*, right?

The question in *Rahimi* was really just an application of *Bruen*: is there a "historical tradition of firearm regulation" in the Nation, per *Bruen,* which protects a trigger-happy domestic batterer? The Fifth Circuit answered in the negative, applying *Bruen*'s test and concluding there was no "historical tradition" of barring the Rahimis of the world from carrying.

So one might safely bet that Justice Thomas, the "*modren* man" who molded *Bruen* just 24 months prior, would be the logical source of authority for interpreting *Bruen*'s test and explaining the proper outcome of *Rahimi*. Right?

Wrong.

Two weeks before this issue went to print, the Court upheld 922(g)(8)'s constitutionality 8-1, reversing the Fifth Circuit. Justice Thomas was the lone dissenter, his carefully crafted *Bruen* majority opinion so coopted (he might say so corrupted) as to be "masked."

But with what? Mr. Roboto's leaden face (watch the music video on YouTube) is flat, depthless. The *Rahimi* eight's vizard is Janus in a house of mirrors. Various opinions viewed *Bruen*'s test as through a winding kaleidoscope, colored by the text, history, tradition, pre-ratification history, post-ratification history, and precedent of the Second Amendment. These opinions read like debates of theologians – they sift and sort, but the cards just end up reshuffled, as if each creator rearranged the spectrum with her own prism.

A few years ago, reflecting on the late Justice Scalia's legacy, Justice Kagan famously remarked that "we're all textualists now." (You'll see that quote in a feature article in these pages). But *Rahimi* (and one could say *Bruen* as well) unapologetically goes beyond the text. If we stopped at the text, Mr. Rahimi would likely have a gun. But no one wanted that. Society couldn't afford that. So we had to "refine" *Bruen* (Justice Thomas has the prerogative to interpret his own majority opinion therein). The standard changed. The goalposts moved.

*****

To my point, then. Yes, I know - it's been a long time coming.

We spend a lot of time talking about AI in law. We'll talk about it in this issue. How it will impact practice. How it should facilitate some tasks in matter handling. How its use should be disclosed, and at times limited.

How should we interpret words in a statute or in a contract? Google Gemini might well accumulate the world's extant wisdom on a term's usage. But that has limits, and properly so, at least at present. AI cannot reliably look forward. It cannot reasonably anticipate the next problem, one always precipitated by humanity's inexhaustible creativity in evading the proverbial rule. AI cannot think for itself. It does not live. AI has no capacity for making an ethical or moral judgment, which sometimes – not always, certainly, but *sometimes* — should properly be considered in forming a legal judgment.

Mr. Roboto was always designed to accomplish the menial task. He was not designed to think creatively. He was not designed to develop legal tests, much less apply them. He was not designed to analyze, but rather to execute tasks, given a set of data or parameters. His task was to facilitate the liberty of the individual – the anonymous individual. But Mr. Roboto has no agency in himself. Mr. Roboto was not designed to have moral judgment. Neither is AI.

The tool is not the laborer. Only Kilroy can free Kilroy.

What does that really mean, you might ask? Like you, I "want to know the secret." *Himitsu o shiritai.*

*****

P.S. – It's not "the" secret, but here's a little one: my headshot at the beginning of this column was created by AI. ▲

▲ Harold Albritton Pro Bono Leadership Award

Harold Albritton Pro Bono Leadership Award

The Harold Albritton Pro Bono Leadership Award seeks to identify and honor individual lawyers who through their leadership and commitment have enhanced the human dignity of others by improving pro bono legal services to our state's poor and disadvantaged. The award will be presented in October, which is officially designated Pro Bono Month. To nominate an individual for this award, submit no more than two single-spaced pages that provide specific, concrete examples of the nominee's performance of as many of the following criteria as apply: 1. Demonstrated dedication to the development and delivery of legal services to persons of limited means or low-income communities through a pro bono program; 2. Contributed significant work toward developing innovative approaches to the delivery of volunteer legal services; 3. Participated in an activity that resulted in satisfying previously unmet needs or in extending services to underserved segments of the population; or 4. Successfully achieved legislation or rule changes that contributed substantially to legal services to persons of limited means or low-income communities. To the extent appropriate, include in the award criteria narrative a description of any bar activities applicable to the above criteria. Nominations must be submitted by Aug. 1. For more information about the nomination process, contact Linda Lund at (334) 269-1515, ext. 2246, or *linda.lund@alabar.org*. ▲

From Robots to Rules:

An Overview of AI and Its Current Legal and Regulatory Landscape

By Brandon N. Robinson and Amy Rodenberger

Artificial Intelligence is "having its moment," a moment that may not last forever, but will certainly have profound effects on our lives in 2024 and beyond. As Secretary of State Anthony Blinken said: "A global technology revolution is now underway. The world's leading powers are racing to develop and deploy new technologies like artificial intelligence… that could shape everything about our lives – from where we get energy, to how we do our jobs, to how wars are fought."[1] Secretary Blinken has not been the only voice chiming in on this transformative era in technology. AI is being discussed on our television screens; in our newsfeeds; at our schools; churches, kitchen tables, and grocery stores; and, of course, by the regulatory powers that be in the United States.

Like many attempts to regulate emerging technologies, the development of a regulatory framework around AI has moved at a cautious pace compared to the rapid advancements in the technology itself,

and likely will continue to do so. Right-sizing regulation of rapidly evolving technology can be tricky: over-regulation can restrict trade and competition, create an uneven playing field (i.e., pick "winners and losers"), stifle innovation and market forces, and sometimes reduce both consumer and business welfare. On the other hand, under-regulation can lead to unpredictable, inconsistent, or even deceptive products or services; a lack of transparency and accountability; intellectual property disputes; and for consumer technologies, security and privacy concerns. One thing is clear, however – that AI has moved from experimental and academic to mainstream and operational – as more businesses and individuals alike incorporate the use of AI into their daily commercial and personal lives.

Artificial intelligence in some form (e.g., machine learning) has been around since the 1950s, when British mathematician Alan Turing began exploring its possibilities.[2] The term was said to be coined by computer scientist John McCarthy in 1955, when he developed the first AI programming language, Lisp.[3] However, the last decade has witnessed dramatic increases in computing power, a marriage of AI capabilities with "big data," and advancements in deep learning, neural networks, and large language models, all of which have converged to lead to breakthroughs in artificial intelligence at a dizzying pace and through a variety of applications. Thus, as regulators continue to grapple with "big tech," a sentiment has emerged – across political aisles, tech industry, and even among the public – that it *is* time for some form of regulation of AI, and that the time for such regulation is *now*.[4] As of the summer of 2024, we are still just beginning to see what that regulation might look like.

What Is AI Anyway?

Before we discuss the regulation of AI, however, it is important to clarify what AI *actually* is, something even our lawmakers allegedly admit they do not fully grasp.[5] The umbrella term "AI" is thrown around in the media and certain circles without the specificity required to fully understand the benefits and risks associated with certain types, uses, and applications of artificial intelligence. Understanding AI is difficult for many reasons. For starters, it involves computer and data science terms that most of us have never heard before nor care to understand in more than a general sense. Additionally, and perhaps an effect of the difficulty in explaining AI rather than a cause, there is no universal definition of AI. Even within the U.S. government itself, there is no definite consensus, just common aspects of a definition. For example, the National Artificial Intelligence Act of 2020 defines AI as:

> "[A] *machine-based system* that can, for a given set of *human-defined objectives,* make *predictions, recommendations or decisions* influencing real or virtual environments."[6]

The proposed Future of Artificial Intelligence Act, meanwhile, defines AI as:

> "Any *artificial systems* that *perform tasks* under *varying and unpredictable circumstances, without significant human oversight,* or that can learn from their experience and improve their performance."[7]

Both of these definitions are accurate descriptions of AI, but they clearly do not say or mean the same thing. Numerous definitions like these are currently peppered across various pieces of legislation, regulations, and industry standards.

Adding to this confusion is the fact that AI itself is an umbrella term, within which there are a great many different types of AI. While

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"AI" is today's simple buzzword, and the newest and most advanced iterations of AI garner the most attention, not all AI tools are new, nor are they all colloquially known as AI. Spell check on our Word documents, suggested content on our social media feeds, and traffic apps that help us avoid congestion are all applications of AI used already in our daily life, but that we may not necessarily lump in the same category as other, newer AI technology. This means that AI is not one single thing that needs to be regulated; it is a myriad of tools, models, algorithms, etc., each of which takes many forms and will change our lives in different ways. There is "narrow AI," "general" or "strong" AI, and "superintelligent AI." There is machine learning, deep learning, natural language processing, and the use of AI with large language models (often thought of as "generative AI"). "Narrow AI" refers to AI that can perform only narrow sets of tasks. Contrast these with "broad AI," which we see growing exponentially today,[8] that enables groups of AI systems to work together and perform more complex sets of tasks, the kinds of things that previously only fictional machines could do. Each of these types of AI has its own capabilities and limitations and comes with its own set of risks and benefits.

OpenAI's ChatGPT is one of the first examples of broad AI to gain mainstream popularity and arguably launched today's AI frenzy. ChatGPT uses generative AI technology to interpret massive amounts of data; find patterns and statistical likelihoods within that data; and "generate" text, images, movies, and music in response to human prompts based off of what it has learned from the data.[9] Although it was first introduced only two years ago, today ChatGPT already has valid competitors in Google, Microsoft, Amazon, and more, and the advances from these and other tech companies do not seem to be slowing down.[10] Building off the success of generative AI models and the other advances in broad AI technology, these companies are building AI technology that really will "shape everything about our lives," as Blinken said, from entertainment to health to finances and beyond.[11]

Even today's top computer scientists and tech engineers cannot predict all of AI's capabilities over the next decades; what we *do* know, however, is that such potential also carries a corresponding amount of risk.

AI continues breaking and recreating the boundaries of its definition, and this might mean a set definition will not emerge for some time. This is as exciting as it is terrifying. There is an open-ended amount of potential in AI technology because of how "broad" it is and how quickly it is advancing. Even today's top computer scientists and tech engineers cannot predict all of AI's capabilities over the next decades; what we *do* know, however, is that such potential also carries a corresponding amount of risk. Some risks of AI are already known, some are sector- or application-specific, and some are relevant only to the developers of the AI technology, not those who utilize it. For these and other reasons, regulatory frameworks around AI will likely: (i) be dispersed across multiple agencies, sectors, and jurisdictions within the US; and (ii) continue to evolve along with the technology.

The current regulatory trend in the United States already exemplifies this multifaceted and decentralized concept. It involves overarching federal frameworks highlighting basic rights, executive agency-specific rulings targeting sector-specific issues, implementation and enforcement of more general laws to cover AI-specific risks, various Congressional bills attempting to either address AI comprehensively or tackle discrete issues more narrowly, and individual state efforts to address all of AI's promises while mitigating its risks to society. In the following sections, we present an overview of a few recent examples of regulatory efforts at various levels.

International Action

Just as the European Union took the lead on privacy regulation with the its General Data Protection Regulations ("GDPR") (which we later saw reflected in U.S. state laws, such as California's Consumer Privacy Act, later amended by the California Privacy Rights Act), it passed the first comprehensive AI regulation this spring with the E.U. AI Act. This followed years of debate among representatives of the European Commission, the European Parliament, and the Council of

the European Union on the shape and contents of the Act.[12] The resulting legislation classifies applications of AI into three levels of risk: AI that creates unacceptable risk is banned; AI that creates high risk is subject to specific rules and requirements; and AI that poses little or low risk is left largely unregulated. The Act also differentiates between developers and deployers (or users) of AI, with the majority of obligations falling on the former. In accordance with the Act's provisions, the European AI Office was established within the Commission to oversee the Act's enforcement and implementation.[13]

Like with the GDPR, the E.U.'s regulation will likely impact U.S. and other businesses outside of the E.U. that wish to operate in the E.U., and some "high risk" AI systems could even be completely banned. And while the E.U. is the first to pass such regulations, the AI Act will likely serve as a model for future regulations by more authorities. By the end of 2023, numerous other countries, including China, India, and Japan, had proposed their own AI regulatory frameworks, some comprehensive in nature like the E.U.'s, but others more specific. Additionally, as of April 2024, the United Nations General Assembly also adopted its first resolution on AI rules, with all 193 member nations supporting the adoption.

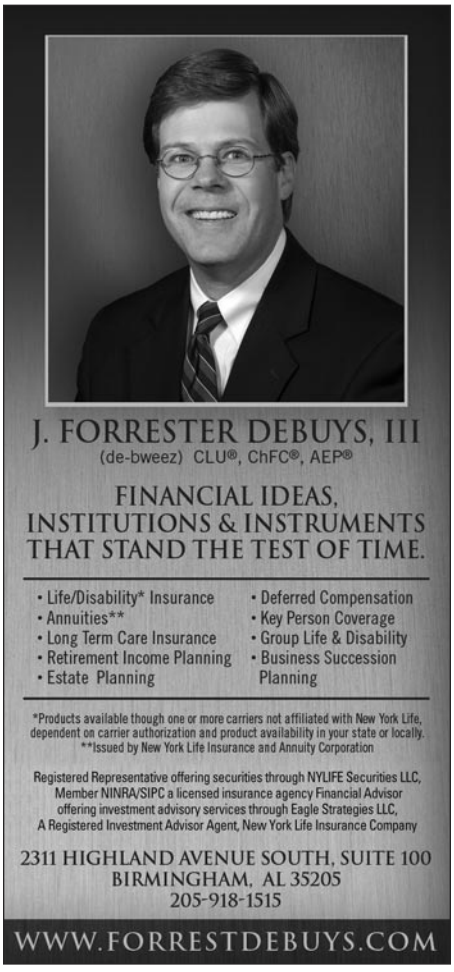
Federal Executive Action

In the U.S., the President and the Executive Branch have addressed AI in multiple ways, including by setting forth guiding principles to companies and agencies on the creation and use of AI and by demanding concrete action across the Executive Branch. One of the earliest examples of executive action was the "AI Bill of Rights," published in October 2022 by the White House Office of Science and Technology Policy.[14] It focuses on protecting civil rights and democratic values in the age of AI and sets forth five principles to "guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence."[15] These nonbinding principles lay out a framework of both potential threats from AI and general standards to mitigate these threats and highlight what the federal government will be most focused on in the coming years. They include ensuring that: (1) AI systems are safe and effective; (2) algorithms are fair and nondiscriminatory; (3) individual privacy rights are respected; (4) readily available notice is given to citizens about when and how AI is used; and (5) the design, development, and implementation of AI keeps human rights and well-being at the forefront.

In October 2023, a year after the AI Bill of Rights was published, the White House announced President Biden's Executive Order ("EO") on the Safe, Secure, and Trustworthy Development of AI, the third and most comprehensive order on AI to date.[16] Like the Bill of Rights, this EO emphasizes the core principles needed to responsibly develop and use AI systems while addressing its potential risks: primarily concerns associated with bias, discrimination, and privacy. However, it also highlights the importance of AI innovation in the U.S. and the desire of the Executive Branch not to stifle development with overbearing regulations. Most concretely, it directs federal agencies to develop specific action plans for responsible AI use within their respective jurisdictions. In addition, it requires these agencies to address and report on key security risks arising from their AI use and to conduct risk assessments on AI use in critical infrastructure sectors.

Agency Action

Since the President issued the EO, federal agencies have begun developing action plans to address AI-related issues within their specific areas of expertise and have taken other steps to further their



individual studies and deployments of AI. Many agencies appointed internal chief AI officers as initial steps in this process.[17] Additionally, as of the spring of 2024, numerous agencies, including the Department of Defense (DOD), the Department of Transportation (DOT), the Treasury, and the Department of Health and Human Services (HHS) have completed their risk assessments.[18] Finally, different agencies have proposed rulemakings specific to their sectors on a variety of far-ranging issues. For example, the DOT has focused on self-driving cars amongst other AI transportation technologies, and the Food and Drug Administration is prioritizing regulating AI for the development of medical products.[19]

These same agencies and others are also working to apply existing general legislation to new issues arising from AI. Many of these efforts relate to anti-bias and anti-discrimination legislation and include enforcement of bills like the Equal Credit Opportunity Act, the Fair Housing Act, and Title VII of the Civil Rights Act.[20] This has been seen with the Securities and Exchange Commission ("SEC") and Consumer Financial Protection Bureau ("CFPB"), as both agencies have separately proposed rules ensuring financial systems in the U.S. using AI in their decision making processes remain unbiased for all consumers.[21] Other efforts by agencies relate to ensuring existing privacy-related laws, such as the Health Insurance Portability and Accountability Act ("HIPAA"), the Fair Credit Reporting Act ("FCRA"), and the Children's Online Privacy Protection Rule ("COPPA"), remain enforced in spite of the onslaught of AI technology.

The FTC's mandate has always been interpreted broadly, and the organization has already begun scrutinizing AI within this context, specifically in areas like misleading AI practices, unfair data collection, and algorithmic biases.

Notably, the Federal Trade Commission (FTC) has emerged as a leader in the agency efforts to mitigate AI risks, focusing specifically on risks that are created by companies and that impact consumers. They assert jurisdiction derived from Section 5 of the FTC Act, which prohibits unfair or deceptive acts and practices by businesses.[22] The FTC's mandate has always been interpreted broadly, and the organization has already begun scrutinizing AI within this context, specifically in areas like misleading AI practices, unfair data collection, and algorithmic biases. For example, on February 27, 2024, as a result of an FTC lawsuit, a federal court temporarily shut down a business opportunity scheme that lured consumers to invest $22 million in online stores, using claims that their use of AI would ensure success and profitability for consumers who agreed to invest.[23] The FTC has no specific AI rules yet, but additional efforts to build on this Section 5 enforcement and to protect citizens from AI use more broadly are expected and will likely set the pace for the rest of the administration.[24]

Congressional Action

Congress has also been actively attempting both to understand AI and to mitigate its risks in numerous, although not completely cohesive, ways. The federal legislature has held hearings across committees and parties; proposed legislation that addresses AI comprehensively but also targets specific AI-areas, including national security, research and development, and election security; and announced competing, bipartisan frameworks to guide forthcoming AI legislation in a holistic manner. The federal legislature also hosted a well-attended forum on AI in the fall of 2023, where Senate Majority Leader Chuck Schumer (D-NY) gathered two-thirds of the Senate along with key AI tech CEOs, civil rights leaders, and labor rights representatives to discuss potential AI legislation. Then, in May 2024, the Senate released a "Roadmap for Artificial Intelligence" that recommended further study into how existing regulations can apply to AI but did not itself create any explicit guardrails.[25] This widespread and bipartisan interest and support of AI regulation suggests that at least some of the more targeted bills will be passed, although the odds of comprehensive legislation passing in this year's legislative session are uncertain.

Individual State Action

There has also been a flurry of state activity over the past year with respect to AI, differing widely across the country, but that has mirrored federal efforts in that some proposals address discrete concerns while others address AI more holistically.

The numbers representing the breadth of state action speak to the importance of these issues at the state level. For example, in 2023, 25 states introduced AI bills. Most prominently, at least 12 states have passed bills to address privacy concerns, including California.[26] Several other bills have addressed bias and discrimination, fair election protections, and children's rights with respect to generative AI content. Several states, including Alabama, have passed laws mandating further government research on AI's potential.[27] Other states even went so far as to establish AI Advisory Councils and specific state divisions to address AI.[28] Colorado was the first state to pass a comprehensive AI law, in May 2024, that requires developers and deployers of AI to comply with various reporting and compliance obligations. Finally, the National Conference of State Legislators, a nonpartisan organization of sitting state legislators, published an AI report in the summer of 2023 that focused on exploring best practices for state regulations, building a consensus around AI definitions, and raising awareness on the risks of AI.[29] As states have historically done, these efforts and experimental approaches to AI legislation will demonstrate what ideas work and what ideas do not and will hopefully guide future federal legislation and agency action.

Conclusion

While this piecemeal approach to AI regulation may initially be cause for confusion and distress among those innovators and entrepreneurs who may be impacted, it is not unique in how our country has historically approached new and emerging technologies. Indeed, consider the introduction of the automobile or the airplane. When first introduced to the public, there were few, if any, existing guardrails in place to protect people from the risks of these technologies. Slowly but surely, both federal and state regulation evolved along with the technologies. Seatbelts were introduced and later mandated. States developed speed limits and required driver's licenses for which driving tests were required. Today, the Department of Transportation ("DOT") and Federal Aviation Authority ("FAA") regulate the automobile and aviation industries at the federal level, while the Transportation Security Administration ("TSA") is responsible for ensuring the safety and security of the traveling public, alongside state highway safety offices and departments of transportation. There are safety standards for companies that create cars and planes and serious consequences when violations occur. This evolution reflects our philosophy that technology is neither good nor bad, but rather dependent on how it is used, by whom, for what purposes, and under what restrictions or standards – all designed to harness the benefits of technology while mitigating its risks. And AI is no different.

As the AI regulatory framework grows in the U.S., there will continue to be new and evolving laws to match the new and evolving technologies. We should expect more activity in the months and years that follow, as many federal and state branches of government across the country, as well as technical, standards, and industry organizations, prioritize how to address AI most effectively. As President Biden's Executive Order idealistically stated, the overarching goal of AI regulation should be "to ensure that America leads the way in seizing the promise and managing the risks of artificial intelligence."[30] The past year gave us a small glimpse of how our federal and state governments intend to address these goals, and 2024 will continue to be a banner year in the AI regulatory space as more regulations are proposed and passed. ▲

Endnotes

1. *Artificial Intelligence (AI)*, U.S. DEP'T OF ST., https://www.state.gov/artificial-intelligence/ (last visited Mar. 11, 2024).
2. *See, e.g.*, THE ALAN TURING INSTITUTE, https://www.turing.ac.uk/about-us.
3. John McCarthy, *History of Lisp*, STANFORD UNIV. (Feb. 12, 1979), *http://jmc.stanford.edu/articles/lisp/lisp.pdf*.
4. Francois Candelon, et al., *AI Regulation is Coming*, HARV. BUS. REV. (Sept. – Oct. 2021), https://hbr.org/2021/09/ai-regulation-is-coming.
5. Cecilia Kang & Adam Satariano, *As A.I. Booms, Lawmakers Struggle to Understand the Technology*, N.Y. TIMES (Mar. 3, 2023), https://www.nytimes.com/2023/03/03/technology/artificial-intelligence-regulation-congress.html; *AI Legislation*,

Lawmakers and Companies to Watch right now, AXIOS PRO, https://www.axios.com/pro/reports/ai-legislation-lawmakers-companies (last visited Mar. 11, 2024).

6. National Artificial Intelligence Initiative Act of 2020, H.R. 6216, 116th Cong. § 3 (2020) (emphasis added).
7. FUTURE of Artificial Intelligence Act of 2020, S. 3771 116th Cong. § 3(b)(2)(A)(1) (2020).
8. For more information on different types of AI, see *Artificial Intelligence Topic Page*, IAPP, https://iapp.org/re- sources/topics/artificial-intelligence-1/ (last visited Mar. 11, 2024).
9. For more information on how generative AI works, see Kim Martineau, *What Is Generative AI?*, IBM (Apr. 20, 2023), https://research.ibm.com/blog/what-is-generative-AI.
10. Andrew R. Chow & Billy Perrigo, *The AI Arms Race Is Changing Everything* TIME (Feb. 16, 2024), https://time.com/ 6255952/ai-impact-chatgpt-microsoft-google/.
11. *Supra* at n. 1.
12. Council of the EU Press Release, Artificial Intelligence Act: Council and Parliament Strike a Deal on the First Rules for AI in the World (Dec. 9, 2023), https://www.consilium.europa.eu/en/press/press-releases/2023/12/09/artificial- intelligence-act-council-and-parliament-strike-a-deal-on-the-first-worldwide-rules-for-ai/.
13. *Commission Decision Establish the European AI Office*, EUROPEAN COMM'N (Jan. 24, 2024), https://digital-strat- egy.ec.europa.eu/en/library/commission-decision-establishing-european-ai-office.
14. *Blueprint for an AI Bill of Rights*, WHITE HOUSE, https://www.whitehouse.gov/ostp/ai-bill-of-rights/ (last visited Mar. 11, 2024).
15. *Id.*
16. Exec. Order No. 14110, 88 Fed. Reg. 75191 (Nov. 1, 2023).
17. Rebecca Heilweil & Madison Alder, *Here's Who's Responsible for AI in Federal Agencies*, FEDSCOOP (Nov. 28, 2023), https://fedscoop.com/heres-whos-responsible-for-ai-in-federal-agencies/.
18. *Federal Agencies Issue Status Report on White House AI Executive Order Implementation*, PERKINS COIE (Feb. 12, 2024), https://www.perkinscoie.com/en/news-insights/federal-agencies-issue-status-report-on-white-house-ai-executive-order-implementation.html.
19. *See, e.g., Global AI Law and Policy Tracker*, IAPP, https://iapp.org/resources/article/global-ai-legislation-tracker/ (last visited Mar. 11, 2024).
20. Lawrence Norden & Benjamin Lerude, *States Take the Lead on Regulating Artificial Intelligence*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/states-take-lead-regulating-artificial-intelligence (last updated Nov. 6, 2023). *See also*, *infra* at n.22.
21. *Supra* at n.19.
22. Federal Trade Commission Act of 1914, 15 U.S.C. § 45.
23. *See* Stipulated Order for Permanent Injunction and Monetary Judgment, *Federal Trade Commission vs. Automators, LLC*, Case No. 23-CV-1444-DMS-BGS (S.D. Cal. 2024).
24. *See, e.g., Statement of Chair Lina M. Khan Regarding the Joint Interagency Statement on AI*, FED. TRADE COMM'N (Apr. 25, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-of-chair-lina-m-khan-re-joint-interagency-statement-on-ai.pdf.
25. THE BIPARTISAN SENATE AI WORKING GROUP, 118th Cong., *Driving U.S. Innovation in Artificial Intelligence: A Roadmap for Artificial Intelligence Policy in the United States Senate* (May 2024), https://www.young.senate.gov/wp-content/uploads/Roadmap_Electronic1.32pm.pdf.
26. *Artificial Intelligence 2023 Legislation*, NAT'L CONF. ST. LEGISLATURES (last updated Jan. 12, 2024), https://www.ncsl.org/technology-and-communication/artificial-intelligence-2023-legislation.
27. *Supra* at n. 20.
28. *Supra* at n. 26.
29. *Id.*
30. *FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence* (Oct. 30, 2023) https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/.

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Using AI in Litigation

By J.R. Davidson

You Are Already Using Artificial Intelligence

Today, few of us ever visit our firm or law school libraries to research a legal question in printed material. LexisNexis went online in 1996.[1] Westlaw.com was released in 1998 as the first web-based version of Westlaw.[2] Whether we acknowledge it or not, we have some basic level of trust that LexisNexis has properly "Shepardized" and Westlaw has properly "KeyCited" the precedent we research. Faith in collectively accepted precedent is the fiat currency of the practice of law. But how do these search engines really work?

According to the Berkeley Law Library, "Both Westlaw and Lexis use a default Natural Language search, similar to Google's: type a keyword, a group of terms, or a question, and press Enter. Results appear ranked for relevancy."[3] Natural language search is powered by natural language processing, which is a branch of artificial intelligence, or "AI." Even if you're searching with Boolean operators (the "terms and connectors" most of us forgot after our legal writing classes), whatever database you are querying likely has used some form of machine learning to organize and restructure the cases, statutes, and secondary sources it contains. If you are using Westlaw, LexisNexis, Trellis, Fastcase, Casetext, or any of the handful of other search engines or their sub-features, the odds are high that you are already using "AI" in some format.

Docket Alerts/Client Alerts

The easiest way to begin using AI in litigation is to sign up for a docket alert service (e.g., Docket Alarm, Docket Alerts, etc.).[4] In fact, most commercial litigators tap into new business opportunities by registering for alerts with some form of docket alert service.

At this point you may be asking: Do I not already receive alerts from Alacourt or PACER for cases I am involved in? Does opposing counsel not have to serve me with a copy of every filing? Sure, but even assuming you automatically receive alerts for cases where you are counsel of record, what about cases against your clients' competitors, or cases based on facts or questions of law similar to those your client is facing? While setting up multiple alerts for cases you are interested in may be cumbersome, legal analytics platforms with alert-only type services, like Courthouse News Service and Trellis, can help find similarly situated cases, generate alerts, and use the information these cases provide for deep legal analysis.

Trellis, for example, uses AI to provide clients with daily filing reports for new cases and docket entries.[5] A daily filing report is much more than a traditional docket alert. It is a spreadsheet that contains detailed coverage of newly filed state and federal litigation actions, filed in a specific jurisdiction, curated just for the user. Reports can be emailed to subscribers every morning and include all case metadata (i.e., judge, party, counsel, practice area) as well as direct links to the docket and the complaint. This saves the time and expense of having an associate or staff member constantly check a court's docket.[6]

Generative AI

But doesn't AI often get things wrong? We all know, for example, the horror story of the New York attorneys who were sanctioned for filing a brief citing fake cases generated by ChatGPT.[7] At one level, time and use refine the output AI provides a user. Unlike the machine learning and natural language processing AI we have already been using (whether we knew it or not), *generative* AI ("GenAI") technologies like ChatGPT (developed by OpenAI), Gemini (Google), Claude (Anthropic), and Llama (Meta), just to name a few, can create new material. These GenAI platforms typically operate in the form of question and response between the user and a "chatbot." GenAI programs are built around, or "trained" on, among other things, large language models ("LLM") consisting of billions of words of ordinary language.[8] Most of us are familiar with chatbots, but now with GenAI powered chatbots, not only can you ask questions, you can tell the chatbot to do something based on certain instructions (a "prompt") and it will *generate* the output in the form of something new: new text, new images, new audio, etc.

OpenAI made ChatGPT available to the public in November 2022, and its growth and adoption in use has exploded exponentially. With the recent explosion of GenAI technology, the legal world is slowly reacting to what could be landmark changes in the way attorneys practice law. This is true across both transactional and litigation practices. Lawyers are finding ways to incorporate AI, including GenAI, into their practices while still protecting client data, maintaining privilege, and avoiding pitfalls like those mentioned in the New York case above.[9]

Be Not Afraid

Lawyers should embrace AI with the understanding that it is a supplement, not a replacement, for human legal reasoning. "[J]ust like artificial intelligence is not intelligence, machine learning is not learning."[10] It is almost cliché at this point, and that is because it is true: AI is never going to fully replace lawyers, but lawyers using AI may replace lawyers who do not.

When LexisNexis and Westlaw were digitized, lawyers who became adept at using Boolean operators combined with natural language search immediately gained an advantage over those who kept digging through the old Michie's and West's reporters. But lawyers still have to take the materials Westlaw or LexisNexis provides to craft arguments for their clients. Similarly, while AI and GenAI can now take some of the legwork out of legal research and writing, they are never going to replace a human attorney's ability to make value judgments. AI is only as good as the information it is trained on and the lawyer using it.

So how can attorneys, especially litigators, use AI to their advantage, while remaining ever mindful of its limitations? The following paragraphs will walk through just a few examples of how various AI technologies can give litigators a competitive edge.

Pleadings and Motion Practice

What do you do with these filings and their respective metadata? Let us use a real-world example. Everyday legal practice is filled with stories about attorneys asking their colleagues for anecdotes about a judge, a jurisdiction, a client, or opposing counsel – anything that may give them an advantage in litigation. What if you had this information at your fingertips via AI, and what if it were measurable?

Imagine you represent a manufacturer, as either in-house or local counsel, and your client is being sued for a workplace injury. You can now use a legal analytics platform to catalog every dispute filed against your client and its industry peers by browsing through an archive of daily filings reports and registering for new alerts for any cases involving workplace injuries. The outcome of this simple practice can reveal astounding, otherwise unidentifiable, insights about the current litigation landscape, all displayed in an interactive dashboard:

- How are the judges in different jurisdictions handling these types of cases?
- What types of arguments are holding sway?
- Does opposing counsel tend to settle early? Do they usually push through to trial?
- What are typical settlement values for cases with similar facts?
- Is there anything your client can put into practice now to help them mitigate their risk of exposure to litigation in the future?

This information can then help you "optimize" your motion practice. You can make a statistically informed decision on what motions are likely to succeed in a given forum. This in turn will likely save you time and your client money.[11]

What about the actual work of motion practice, that is, drafting the documents? Most practicing attorneys would not dream of drafting a pleading or motion by

hand, from scratch. We take bits and pieces of previous filings, cases, and other templates we have saved, and we mold them into a document that suits our client's needs. What if your docket alert or legal analytics service provided drafting capabilities within their respective platform, allowing you to copy and paste from filed documents which their system has already "read" (performed optical character recognition, or "OCR")?

But is OCR not just a fancy way of converting a PDF to Word to cut snippets from old documents? Could a good associate with Adobe not do the same? That is true. But what if you could train AI to *write like you write*.

Picture yourself as a senior partner who wants to work fewer hours while still guiding the younger attorneys at the firm. You can now mold certain tech to mimic your hard-won legal acumen. As legal tech experts Noah Waisberg and Dr. Alexander Hudek have noted, "[o]ne of the most interesting implications of artificial intelligence is that if you teach it to be like you, to answer questions as you would, or to make the legal decisions that you would make in a specific situation, you could – effectively – be doing work when you're not actually doing work. Consequently, the retiring senior partner mentioned above could be vacationing in the Cayman Islands while his insights are benefiting attorneys in his former firm. If this sounds closely like a 'robotic' attorney, it is, minus the tailored suits and cliché stock photos."[12] These developments are real, and they are happening in real time.

Discovery

Most litigators are familiar with electronic discovery ("eDiscovery") platforms that help manage document review of electronically created information. These services help attorneys filter through mountains of emails, letters, contracts, invoices, receipts, and other electronic documentary evidence (or print material that has been digitized), both to provide relevant discovery responses and to scour opposing counsel's production. Still, reviewing hundreds or thousands of emails to find the handful that are responsive to a discovery request is time-consuming, expensive, and not always successful.

AI is having a tremendous impact on this search-and-review phase of discovery. While eDiscovery platforms have long been able to perform OCR to sort and filter otherwise unsearchable documents, this has only

marginally reduced the time spent manually reviewing eDiscovery material. With AI, attorneys can now go through a relatively small sample of documents to train the eDiscovery platform on what they are looking for. The system can then perform a search of the remaining records to retrieve relevant material, while simultaneously documenting the math and statistical reasoning it used to later justify its methods to both the requesting attorney and the court.[13]

Solo practitioners and small firms can use this technology to triage their document review, allowing them to take on larger and more complex cases with confidence. In-house counsel can similarly use these features to reduce spending. "You can do data discovery and review with AI, and then use outside counsel to do a more thorough analysis of the most relevant data."[14]

Conclusion

Legal analytics platforms are unpacking the silos that have previously rendered data inaccessible to all but the largest of firms that had the staffing capabilities to chase it down. The practice of law is moving away from gut instinct and towards actionable data. However, "Data, like technology, has no intrinsic value," writes Mark Cohen, CEO of Legal Mosaic.[15] "It acquires enormous significance, however, when it is mined, parsed, and turned into information that is analyzed and crystallized by data analytics."[16]

According to Waisberg and Hudek, "Today, AI enhances lawyers, rather than replacing them. AI is helping lawyers do work that they never would have been able to do before. Instead of framing the decision as whether to trust AI or a human lawyer, consider whether you should trust a lawyer doing work the same old way over a technology-enhanced one. We wouldn't."[17]

Attorneys are constantly required to make judgment calls, at any given moment, based on information about dozens of cases. Whether we know it or not, we each do this by mentally developing our own probability distributions. Each has its own shape and range of possibilities. We know that some outcomes are more likely than others and that some predictions command more confidence than others. Some attorneys make these decisions on gut feeling and instinct. Some rely on legal analytics. *Why not use both?*[18] ▲

Endnotes

1. *LexisNexis: The Future of Law Since 1818,* 19 Legal Info. Mgmt. 26 (2019).
2. Carrie Brooker, *Thomson Reuters Celebrates 150 Years*, Legal Current (Aug. 18, 2022), https://www.legalcurrent.com/thomson-reuters-celebrates-150-years-10-early-innovation-milestones/#:~:text=1998%20%E2%80%93%20New%20Westlaw.com%20is,instead%20of%20requiring%20installed%20software.
3. *Lexis & Westlaw Search Tips & Tricks,* Berkeley Law (last updated May 14, 2024, 3:06 PM) https://libguides.law.berkeley.edu/c.php?g=848033#:~:text=Both%20Westlaw%20and%20Lexis%20use,Results%20appear%20ranked%20for%20relevancy.
4. Docket Alarm, https://www.docketalarm.com/ (last visited March 8, 2024); Docket Alerts, https://www.docketalerts.com/ (last visited March 8, 2024).
5. Trellis, https://trellis.law/daily-filings-report (last visited March 8, 2024).
6. Nicole Clark, *Going With the Flow of Civil Litigation*, Attorney at Work (June 22, 2023), https://www.attorneyatwork.com/legal-analytics-technologies/#h-the-waves-of-new-litigation.
7. Sara Merken, *New York lawyers sanctioned for using fake ChatGPT cases in legal brief*, Reuters (June 26, 2023), https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/ (stating that the New York attorneys used ChatGPT to write a brief which they then filed without checking the accuracy of the cases cited in the brief. Multiple cases within the brief had been hallucinated by ChatGPT and did not in fact exist.).
8. Timothy B. Lee & Sean Trott, *A jargon-free explanation of how AI large language models work*, Ars Technica (July 31, 2023), https://arstechnica.com/science/2023/07/a-jargon-free-explanation-of-how-ai-large-language-models-work/.
9. Any reference to AI in the remainder of this article will include GenAI, unless specified otherwise.
10. Andriy Burkov, The Hundred-Page Machine Learning Book, xvii (2019).
11. *See* Noah Waisberg & Dr. Alexander Hudek, AI for Lawyers 127 (2021).
12. *Id.* at 73.
13. *Id.* at 100-106.
14. *Id.* at 56 (quoting Mary O'Carroll). *See also* Stephanie Wilkins, *Legal Tech's Predictions for KM, Data Governance & AI Usage in 2024* (January 16, 2024), https://www.law.com/legaltechnews/2024/01/16/legal-techs-predictions-for-km-data-governance-ai-usage-in-2024/
15. Clark *supra* note vi.
16. *Id.*
17. Waisberg & Hudek, *supra* note xi.
18. Clark, *supra* note vi.

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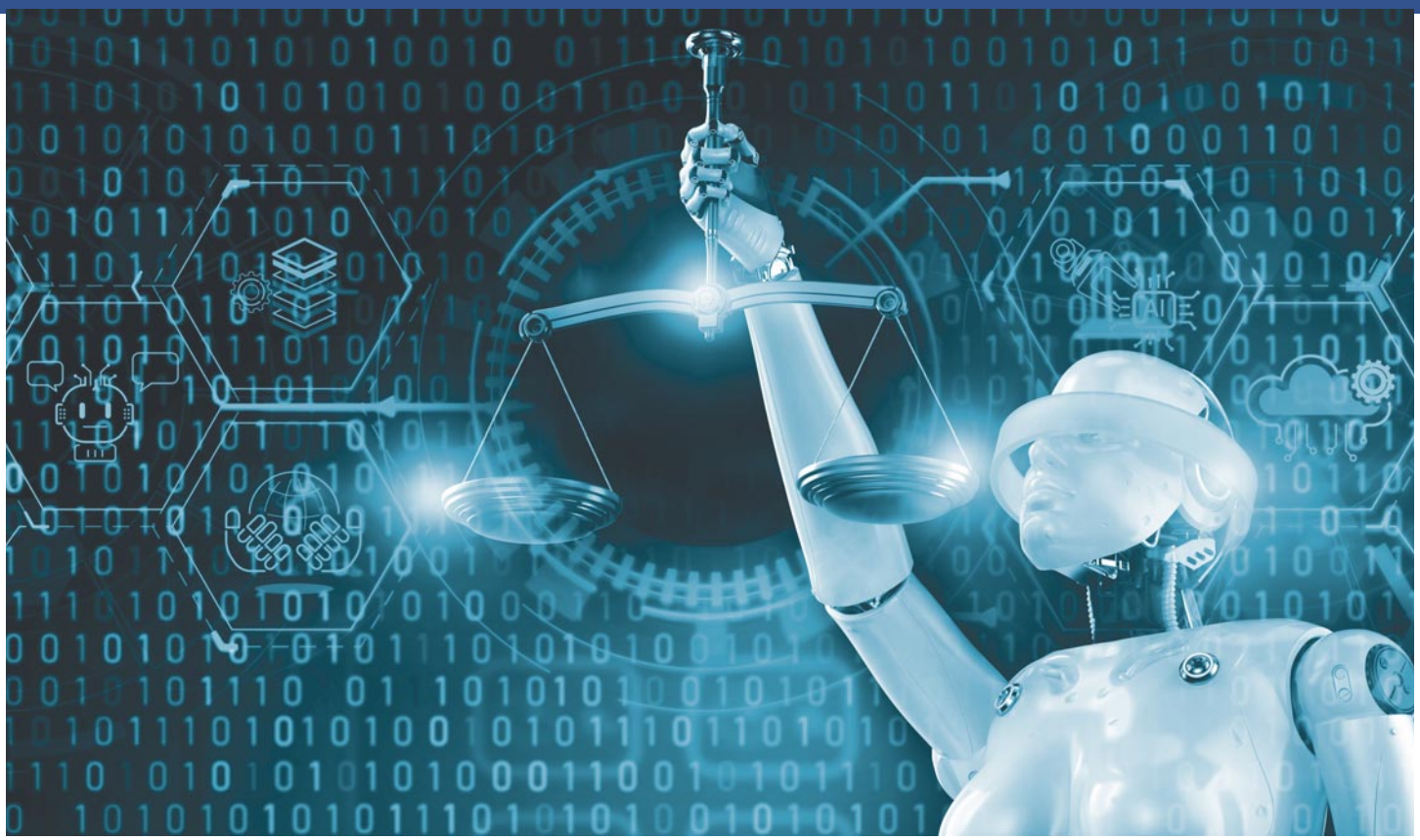


Navigating the Legal Implications Of Artificial Intelligence

By Ashley Robinson and Anne M. Golson

Artificial Intelligence, What Is It?

The terms "artificial intelligence" and "AI" are nearly ubiquitous, but what do they really mean? Despite their pervasiveness, there is currently no uniform dictionary definition of either term. The authors generally understand AI to refer to computer technology with the ability to simulate human intelligence by analyzing and learning from data to reach conclusions, finding patterns, and predicting future behavior. But why not ask the experts? Well, that's what we did – we prompted ChatGPT and Google's Gemini with the following question: "What is the ordinary meaning of artificial intelligence?" Their responses are below:

> **ChatGPT:** Artificial intelligence refers to the simulation of human intelligence processes by machines, especially computer systems. This includes tasks such as learning, reasoning, problem-solving, perception, and language understanding.[1]

> **Gemini:** In its ordinary meaning, artificial intelligence (AI) refers to computer systems

capable of performing complex tasks that were traditionally thought to be exclusive to humans. These tasks include reasoning, problem-solving, and decision-making.

Think of AI as the ability of a machine to "think" and act intelligently, even though it doesn't possess human consciousness or emotions. It's about building systems that can learn, adapt, and perform tasks in a way that mimic human intelligence.

However, it's important to note that the term "AI" encompasses a wide range of technologies, from simple rule-based systems to complex machine learning algorithms. While some AI systems are highly sophisticated and can excel in specific areas, true "general intelligence" that matches human capabilities across all domains remains a theoretical concept.[2]

Unsurprisingly, or maybe surprisingly to some attorneys, the author-crafted definition and the AI-crafted definitions are similar. That is so, as Judge Kevin Newsom recently discussed in his concurrence in *Snell v. United Specialty Insurance Company*, because large language models ("LLMs") draw on such a broad and varied data set that they can fairly and effectively capture the common understanding and usage of a word.[3] That ability to track the evolution of a word's "ordinary meaning" in real time is only one of many AI capabilities that could transform how attorneys approach the practice of law.

Day-to-Day Efficiencies

AI is already an integral part of most attorneys' practices, whether they realize it or not. All attorneys, even AI skeptics, are exposed to artificial intelligence through daily tasks like emailing, reviewing documents, billing, scheduling, and creating templates. Some AI tools, like the predictive email text that appears when you begin to draft a response, may not seem exceptionally helpful. But if an attorney uses that feature in even half of the emails she writes over the course of a day, she has saved valuable time that can be better used on substantive work.

While tools like predictive email text are helpful, they are not the highest and best use of artificial intelligence in everyday legal practice. Attorneys often must engage in routine, pattern-based tasks that require less strategic thinking. These tasks, like drafting engagement letters, billing narratives, and standard letter templates, can be optimized and streamlined by successfully integrating artificial intelligence into your legal practice. And, importantly, such tasks require minimal human oversight or review.

Imagine, for example, an associate who would like to request funds from her law firm to attend a conference. Drafting these requests can be tedious and more time consuming than necessary. But what if this attorney instead made a list of the elements needed in a budget request email and then prompted an AI platform to draft the email for her? Below is an example of such a prompt submitted to ChatGPT and its response:

Prompt: Draft an email from an associate attorney to a partner requesting funds to attend the international trademark association conference in Atlanta in May 2024. Include that I will have two clients also attending the event and that my legal practice includes trademark prosecution and litigation.

Response: Subject: Request for Funding to Attend International Trademark Association Conference in May 2024

Dear [Partner's Name],

I hope this email finds you well. I am writing to request funding to attend the International Trademark Association Conference, which will be held in Atlanta in May 2024. As a devoted associate attorney in the trademark practice group, I believe that attending this conference is crucial for my professional development and will be incredibly beneficial for our firm.

I will be accompanied by two clients who will also be attending the event, providing an excellent opportunity to strengthen our relationships and enhance our client service. My legal practice focuses on trademark prosecution and litigation, and I am confident that the knowledge and insights gained from this conference will contribute significantly to my work with our clients.

Attending the International Trademark Association Conference will allow me to stay up to date with the latest trends and

> developments in trademark law, network with industry professionals, and gain valuable knowledge and insights that will benefit our clients and our firm as a whole.
>
> I kindly request your support in covering the registration fees, travel expenses, and accommodations for this conference. I am confident that the knowledge and connections gained from attending this event will be invaluable to our practice and will ultimately benefit our clients.
>
> Thank you for considering my request. I look forward to discussing this further with you.
> Best regards,
> [Your Name] Associate Attorney[4]

While certainly not perfect, ChatGPT's response provides the attorney with a helpful starting point that she can then revise and perfect. AI has its limitations, but the value of a working first draft is hard to overstate. This scenario is a prime example of how an attorney may use artificial intelligence to safely decrease the amount of time spent on more administrative tasks that do not require creative legal analysis, which artificial intelligence is (thankfully for our job security) unable to accomplish.

Judge Newsom recently identified another way that AI, and specifically LLMs, can provide a helpful starting point for lawyers and judges alike: by assisting in the search for a term's "ordinary meaning."[5] As Justice Elena Kagan stated in a lecture at Harvard Law School, "We're all textualists now."[6] So all interpretive analysis must begin, and often end, with the ordinary meaning of the constitutional, statutory, regulatory, or contractual text.[7] That's where, as Judge Newsom posits, LLMs come in. LLMs train on such large and comprehensive data sets – from the opinions of Justice Antonin Scalia to the musings of teenagers on Tumblr – so that they can effectively suss out the most common and ordinary usages of a term. As Judge Newsom lays out in his concurrence in *Snell*, LLMs are not perfect. But that does not mean they are not helpful. While no one should throw away their copy of *Webster's Second*, you may want to follow Judge Newsom's lead and add a quick, generalized query to an LLM to your textualist toolbox. If Judge Newsom's concurrence in *Snell* is any indication, you certainly would not be alone in doing so.

And while most attorneys likely appreciate a billable task that they can perform in their pajamas, those who have assisted in substantial document reviews know just how time consuming and expensive they can be.

Selecting the Right Tool for the Task at Hand

There are an overwhelming number of artificial intelligence tools available to attorneys, and choosing the right one can be a daunting task. Anyone can ask ChatGPT or Microsoft's Copilot for the ordinary meaning of a term, but there are additional artificial intelligence tools that have been created specifically to assist attorneys in more specialized aspects of a legal practice. Currently, artificial intelligence is most prevalently used in discovery or to assist with legal research. Document review historically required traveling offsite to a warehouse to physically work through boxes and boxes of documents. Some poor souls must still venture into these dusty warehouses and storage facilities, but most new attorneys' introduction to document review involves only electronically stored information. This means emails. Thousands of emails. And while most attorneys likely appreciate a billable task that they can perform in their pajamas, those who have assisted in substantial document reviews know just how time consuming and expensive they can be.

The use of artificial intelligence by document review platforms is nothing new. These platforms have benefited significantly from the rapid evolution of AI technology and have enhanced their review capabilities tenfold in recent years. For example, Relativity has

created "Relativity aiR." The Relativity aiR for Review application "uses natural language and AI-powered predictions to augment the thorniest part of the e-discovery process."[8] It does so by targeting "three specific use cases to make this chore a bit more palatable: responsiveness review (predicting which documents will be relevant to a matter), issues review (locating documents related to the key issues at the heart of a case), and identification of key documents (pinpointing those potential smoking guns that attorneys need to get their hands on as quickly as possible)."[9]

While document review programs like Relativity aiR can significantly increase a legal team's productivity, attorneys must remember that the process was done by a computer. And while the technology is impressive, attorneys must still stay vigilant to avoid disastrous and embarrassing outcomes caused by the technology's imperfections. Because of those imperfections, human quality control is imperative and must be integrated into any AI-based process. The efficiency gains achieved by using these technologies are great, but they cannot replace the human review and analysis that are integral to the practice of law.

A Cautionary Tale

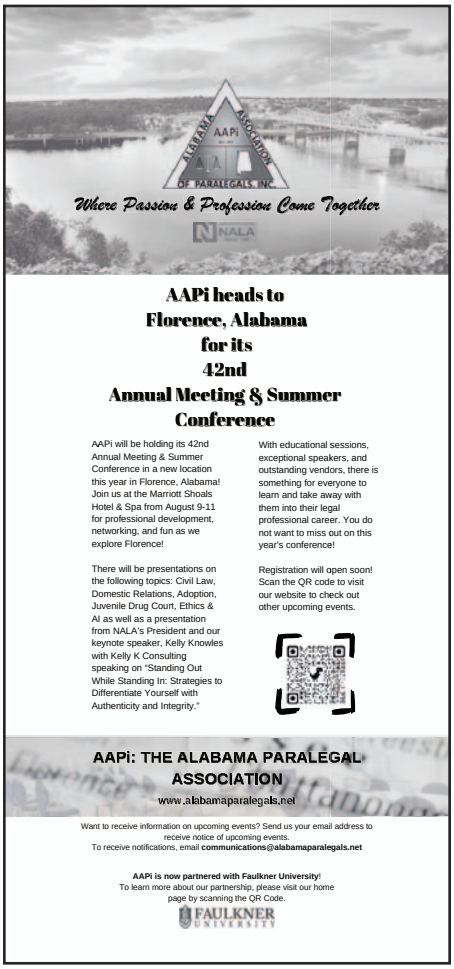
By now, most people have heard stories of attorneys who mistakenly relied on artificial intelligence to support legal briefs and arguments. The courts are not amused. But why are some uses of artificial intelligence so much more dangerous than others? One answer lies in the type of AI used. AI platforms that help speed up the document review process or generate an engagement letter template do not use *generative* artificial intelligence. The budget request email from the associate to the partner, on the other hand, does. What is the difference? The main difference is that generative artificial intelligence uses a set of data to create original content. But that original content is not necessarily accurate. Two New York attorneys for a Roberto Mata learned this lesson the hard way when the court discovered that their brief was generated by artificial intelligence – and that the cases cited in that brief did not actually exist.[10]

Like in the email example, artificial intelligence can provide a solid starting point for legal research, but it should never be used as the unchecked legal basis for any work product, especially for submissions to a court. Imagine our same associate from before is now tasked with outlining a client's position in response to allegations of libel. As a new associate, they are not sure where to start, so they type "elements of libel" into Microsoft Bing's Copilot program. Copilot provides the following response:

Certainly! The **elements of libel** typically include the following:

1. **False Statement of Fact**: The defendant must make a false statement about the plaintiff. This statement can be written (libel) or spoken (slander).
2. **Publication or Communication**: The defamatory statement must be disseminated to a third party. In the case of libel, this usually involves publishing it in writing.
3. **Fault or Intent**: The defendant must be at fault for making the false statement. This fault can be due to negligence or actual malice.
4. **Damage to Reputation**: The plaintiff's reputation must suffer harm as a result of the false statement.[11]

Copilot also provides citations and suggested follow-up questions like "what is the difference between libel and slander?" The associate continues to "chat" back and forth with Copilot, until they have their



bearings. Now, they can efficiently begin their legal research with more targeted search terms.

That is not what Mr. Mata's lawyers did. Instead, they submitted ChatGPT's brief to the court without confirming the accuracy of its content – a mistake that could easily be avoided with a simple cite check.[12] The plaintiff in *Mata* alleged that he was injured when a metal serving cart struck him during a flight.[13] But when his attorneys filed an "Affirmation in Opposition" to a pending motion to dismiss his case, Mata's straightforward personal injury case became anything but. That affirmation in opposition cited and quoted from purported judicial decisions published in the *Federal Reporter*, the *Federal Supplement*, and on Westlaw. Mata's attorneys insisted that the authorities were legitimate, even after defendants and the court questioned the legitimacy of the sources in Mata's affirmation in opposition. But the truth was eventually revealed – Mata's attorneys had used ChatGPT to write the brief, and ChatGPT had fabricated the cases. Schwartz, one of Mata's attorneys, stated that "[he] just was not thinking that the case could be fabricated, so [he] was not looking at it from that point of view. [His] reaction was, ChatGPT is finding that case somewhere. Maybe it's unpublished. Maybe it was appealed. Maybe access is difficult to get. [He] just never thought it could be made up."[14] The court sanctioned the attorneys, required that they notify Mata and the judges that were falsely identified as the authors of the fake opinions of what had transpired, and ordered them to pay a monetary fine.[15]

Of course, this cautionary tale is not meant to deter attorneys from using artificial intelligence in their practice. But like with all other tools, attorneys must use the technology wisely. They should be cognizant of the purposes for which they are using the artificial intelligence and should think critically before relying solely on generated content. In its current iteration, artificial intelligence is immensely helpful in economizing the pattern-based aspects of legal practice. But there is no substitute for the creative legal analysis that an attorney provides. The integration of artificial intelligence into legal practice is likely unavoidable, so it is all the more important for attorneys to understand and assess its limitations. Artificial intelligence is not going anywhere, but it also is not replacing attorneys anytime soon. And that is good news for all of us. ▲

Endnotes

1. ChatGPT, https://chat-gpt.org/chat (last visited May 31, 2024).
2. Google Gemini, https://gemini.google.com (last visited May 31, 2024).
3. *Snell v. United Specialty Ins. Co.*, No. 22-12581, slip op. at 25-56 (11th Cir. May 28, 2024) (Newsom, J., concurring).
4. *Supra* note i.
5. *See Snell*, slip op, at 29 (Newsom, J. concurring).
6. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015) https://www.youtube.com/watch?v=dpEtszFT0Tg.
7. *Snell*, slip op. at 4-6 (Newsom, J., concurring).
8. Sam Bock, *Stemming the Data Tide: Generative AI and Customer Collaboration in RelativityOne*, Relativity Blog (Nov. 6, 2023), https://relativity.com/blog/data-tide-generative-ai-relativityone/.
9. *Id*.
10. *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).
11. Bing Copilot, https://www.bing.com/chat?q=Bing+AI&FORM=hpcodx (last visited March 8, 2024).
12. *Mata*, 678 F. Supp. 3d at 448.
13. *Id*. at 449.
14. *Id*. at 451 (internal citation omitted).
15. *Id*. at 466.

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The Ethics of Generative Artificial Intelligence in Law Practice

By Marcus R. Chatterton

If this edition of *The Alabama Lawyer* and other recent publications are any evidence, the use of Generative Artificial Intelligence (GenAI) in law is *the* hot topic for lawyers right now. The authors of the other articles in this issue have already defined GenAI and contrasted it with the analytical or non-generative types of AI that have existed in the legal industry (whether we know it or not) for many years. My fellow authors have also discussed how GenAI may benefit a law practice and highlighted some of the obvious risks. So, let's cut straight to the question of how a lawyer may ethically use GenAI in a legal practice.

Every lawyer must understand the risks and benefits of technology used in connection with their law practice. Like any new technology, GenAI must be evaluated and used in a way that satisfies a lawyer's obligations of professional responsibility. Applying these obligations will

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always involve many factors, including the identity of the client, the nature of the matter requiring legal services, the lawyer's practice area, and the technology itself. GenAI implicates several areas that are directly regulated by the Alabama Rules of Professional Conduct:

Duty of Competence

ARPC 1.1 explains the foundational concept of legal ethics that "competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Although the technology is continuously improving, GenAI outputs may include information that is false, inaccurate, or biased. Before using GenAI in the practice of law, a lawyer must have an adequate understanding of the technology and its limitations to ensure (1) that the technology is being used in a competent and secure manner, (2) that the output is factually and legally accurate, and (3) that the lawyer, the firm, and the client are not over-relying on the technology.

The potential replication of bias in the output of a GenAI platform has recently come under scrutiny. As Judge Newsom of the Eleventh Circuit Court of Appeals recently noted, data sets used to train a GenAI application are often held in confidence and almost certainly fail to represent certain classes of individuals.[1] Each AI algorithm depends on the data set that is used to train the system – making it inherently susceptible to bias that reflects (and may exacerbate) societal prejudices present in its training data. In the legal context, biased AI systems may perpetuate inequities in decision-making, such as disparate outcomes in sentencing or access to justice.

GenAI outputs may be valuable as a starting point, but they should be scrutinized carefully. The output from a GenAI platform is analogous to driving directions received from a GPS application – it suggests one or more routes to the destination, but the driver is still responsible for navigating the vehicle and exercising human judgment, and that judgment might require departing from the GPS-generated route. The GPS output should never be substituted for the driver's sound judgment. Similarly, GenAI should never be used as a substitute for a lawyer's own professional judgment.

As the State Bar of California recently explained:[2]

> A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results. A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities.

The duty of competence calls for meaningful consideration and care before using GenAI in the practice of law. Conversely, the duty of competence embodied in ARCP 1.1 and other rules might eventually be understood to carry an affirmative responsibility for lawyers to learn and use GenAI in some circumstances. For example, the duty of competence is generally understood to obligate lawyers to become familiar with and use the widely available eDiscovery tools to manage and review large volumes of data exchanged in litigation.[3] To collect and review millions of pages of documents the "old-fashioned way" could arguably trigger a breach of the lawyer's duty of competence, and in many instances, will result in far higher legal costs incurred by the client. Although it is probably not at this point yet, the accessibility and reliability of GenAI may one day reach a point where a lawyer's refusal to learn and use the technology could breach the duty of competency.

Duty of Confidentiality

To provide usable output, GenAI platforms must have access to large amounts of data – in many cases, client-owned data – for training and decision-making. Many GenAI systems are trained on the data submitted by their users, which is then used to generate output for multiple (and perhaps all) other users. ARPC 1.6 obligates lawyers to safeguard "information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." When using client data to train or prompt a GenAI system, a lawyer might satisfy this obligation through a combination of (1) informed consent of the client, (2) verifying that the GenAI vendor has appropriate safeguards and data security, or (3) anonymizing the submitted data to avoid or minimize prejudice to the client in the event that the data is inadvertently disclosed. A lawyer anticipating the need for GenAI's use or involvement in the engagement of a matter may need to cover the topic of data confidentiality and use in a written engagement agreement, so that some "ground rules" are established and client consent can be fully informed.

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Duty to Supervise

ARCP 5.1 and 5.3 obligate any lawyer having supervisory authority over another lawyer or non-lawyers to make reasonable efforts to ensure that their firms or those they are supervising conform to the Rules of Professional Conduct. In practice, this means that firms and legal departments should have a sound policy concerning the use of GenAI, and that senior lawyers cannot turn a blind eye to the methods used by junior lawyers or staff. The output from any GenAI product should be reviewed and scrutinized even more than the work product of a junior lawyer or staff member to ensure that the output conforms with

the standards of quality and accuracy of a legal professional. Again, if a matter arises in which the lawyer anticipates the need for the use of GenAI, it may be advisable to articulate in the written engagement the need for attorney review of GenAI, so that client expectations regarding the relative cost of using GenAI are kept in check.

Duties of Communication And Candor

That last point dovetails with the next rule in play. ARPC 1.4 obligates a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." GenAI applications operate using complex models that may not always be transparent to end-users. Lawyers should ensure transparency in GenAI processes by disclosing the methodologies, costs, and limitations of these systems to clients. Communication regarding the use of GenAI should consider facts and circumstances of both the technology and the specific representation – including the novelty of the technology, risks associated with GenAI, the scope of the lawyer's representation, existing guidance from the client or related entities (like a parent company or an insurer), and the sophistication of the client.

Candor to the Tribunal

A lawyer may also have an obligation to disclose the use of GenAI to the court or another tribunal. Although the scope of ARPC 3.3 does not explicitly require the disclosure of technologies like GenAI, the issued or standing orders of some courts restrict the use of GenAI or obligate counsel to disclose its use in discovery or in the preparation of materials submitted to the court.[4] Conversely, the Fifth Circuit recently declined to implement rules requiring disclosure of GenAI used by counsel: [5]

> The court, having considered the proposed rule, the accompanying comments, and the use of artificial intelligence in the legal practice, has decided not to adopt a special rule regarding the use of artificial intelligence in drafting briefs at this time. Parties and counsel are reminded of their duties regarding their filings before the court under Federal Rule of Appellate Procedure 6(b)(1)(B). Parties and counsel are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require. "I used AI" will not be an excuse for an otherwise sanctionable offense.

Even without a specific order, though, the failure to disclose the use of GenAI may, in some circumstances, constitute a "false statement of material fact" to a tribunal.

Other Risks

Without safeguards, the use of GenAI platforms may expose a lawyer to risks beyond the Rules of Professional Conduct, including (1) exposing confidential data related to their firm or law practice; (2) obligating the lawyer or their firm to comply with undesirable or unacceptable terms and conditions, such as agreeing to indemnify others or granting a license in information contained in training data, prompts, or outputs from GenAI; or (3) inadvertently violating privacy, copyright, or other laws.

Notably, copyright law restricts the preparation of "derivative works" that are based on original works protected by copyright.[6] The potential for copyright infringement in GenAI outputs that are trained using unlicensed works has drawn considerable discussion within the IP bar, and this potential has already generated some litigation.[7] Copyright infringement lawsuits over the content of a lawyer's work product are rare, but they are not unheard of.[8] The use of GenAI to produce graphics, charts, or other summaries used in a brief or other court submission may present a greater risk of copyright infringement to lawyers.

Conclusion

GenAI may soon be as common in the practice of law as email, Microsoft Office, or eDiscovery software. Lawyers wrestled with the ethical implications of those technologies when they were new, just like we are now in grappling with GenAI. While GenAI holds immense potential to enhance efficiency, accuracy, and access to justice, its use will always be guided by the Rules of Professional Conduct, and its output cannot be substituted for a lawyer's own professional judgment. ▲

Endnotes

1. *Snell v. United Specialty Ins. Co.* No. 22-12581, Slip Op. at 22-23 (11th Cir. May 28, 2024) (Newsom, J. concurring).
2. *See* www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf.
3. *See, e.g.* State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193 (finding that California's Duty of Competence carries an obligation to acquire sufficient skill or associate with someone who does before taking on a representation that involves eDiscovery).
4. *See, e.g.* Standing Order for Civil Cases before Magistrate Judge Peter H. Kang (N.D. Ca), *available at* https://cand.uscourts.gov/wp-content/uploads/judges/kang-phk/Civil-Standing-Order-PHK-001.pdf; Mandatory Certification Regarding Generative Artificial Intelligence (Judge Brantley Starr, N.D. Tex.) *available at* https://www.txnd.uscourts.gov/judge/judge-brantley-starr.
5. https://www.ca5.uscourts.gov/docs/default-source/default-document-library/court-decision-on-proposed-rule.pdf?sfvrsn=5967c92d_2.
6. *See generally* Copyright in Derivative Works and Compilations, www.copyright.gov/circs/circ14.pdf.
7. *See generally* https://hbr.org/2023/04/generative-ai-has-an-intellectual-property-problem.
8. *See* www.abajournal.com/news/article/biglaw-firms-motion-was-a-nearly-verbatim-copy-boutique-firm-alleges-in-copyright-lawsuit.

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The year 2024 marks the 20th induction ceremony for the Alabama Lawyers Hall of Fame. The Alabama State Bar's Hall of Fame Selection Committee is extremely proud of this significant milestone. During the first five years of its ceremonial recognitions, from 2005 to 2009, there were four lawyer-honorees each year. However, because there were so many deserving nominees, we increased the number of lawyers recognized from four to five each year. Therefore, with the induction ceremony on May 3, 2024, we have now honored 95 lawyers.

You may ask, what are the criteria for selecting candidates for the Alabama Lawyers Hall of Fame? Here are the standards for our choices:

- Honorees must have a record of extraordinary skill and service to the bar and in the profession of law.
- Honorees must be Alabama lawyers who have made extraordinary contributions through the law at the state, national, or international level.
- Honorees must demonstrate a lifetime of achievement.
- Honorees need some, if not all, of the following traits to qualify:
  - > A breadth of achievement rather than a single achievement
  - > A profound respect for professional ethics
  - > A leadership role in advancing the interests of the community
  - > A recognized ability to mentor, lead, or inspire others to pursue justice
- Honorees must be deceased to be considered.

Honorees must be preeminent exemplars of the legal profession. They have been nominated because they have had a distinguished career in the law. This is demonstrated through many different forms of achievement, leadership, service, mentorship, political courage, or professional success. Each inductee must have been deceased at least two years at the time of their selection. And then comes another challenge. Among the honorees, at least one must have been deceased a minimum of 100 years. This means that no one will have known the potential honoree personally, and the committee will be solely dependent on history books, written records, and the results of their deeds subject to the judgment of time. Thus, the committee considers the totality of a person's life. That places a tremendous responsibility on the committee and requires a significant amount of historical research.

Over the years we have recognized men and women, black and white attorneys, members of the Supreme Court of the United States and the Supreme Court of Alabama; other judges, both appellate and trial, both federal and state; military heroes; public servants; law professors; a clerk of the Alabama Supreme Court and reporter of decisions, Assistant US Attorneys; governors; senators; members of congress; mayors; city councilors; an ambassador; speakers of the Alabama legislature, a speaker of the United States House of Representatives; and a Vice President of the United States. But our largest single demographic is the group of lawyers, all outstanding individuals, who have labored in the field of private practice. All our lawyer-inductees are the true giants, the mentors, and, yes, the heroes of our profession. Their plaques are located in the lower rotunda of the Heflin-Torbert Judicial Building, and together they form a very impressive collection.

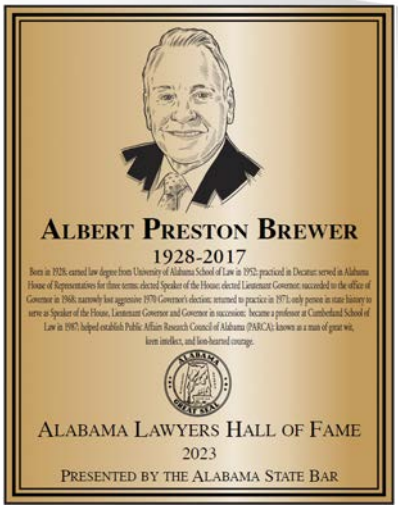
A 12-person panel serves as the Selection Committee for the Hall of Fame. The 12 members are:

- The director of the Alabama Department of Archives and History
- Four people named by the Board of Bar Commissioners for a term of three years
- The immediate past president of the Alabama State Bar
- The executive secretary of the Alabama State Bar or his/her designate
- One person nominated by the Chief Justice of the Supreme Court of Alabama
- One person nominated by each of the three presiding judges of the Federal District Courts of Alabama for a term of three years
- A representative of the Alabama Bench and Bar Historical Society

I encourage anyone to consider making a nomination for our Alabama Lawyers Hall of Fame. The nomination form and instructions can be found on the Alabama State Bar's website. I say this each year, but remember, great lawyers cannot be considered for this honor if they have not first been nominated.

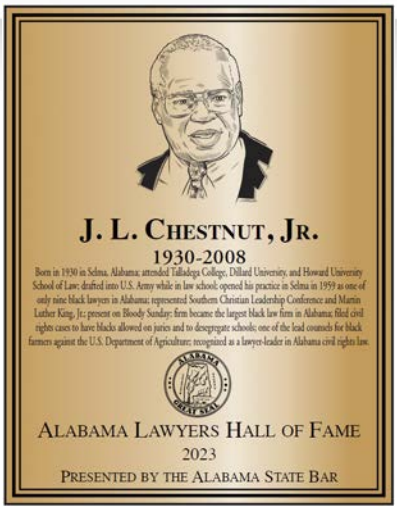
Here are the new inductees to the Alabama Lawyers Hall of Fame. We hope that all their stories and achievements will serve to inspire the present and future citizens of Alabama. ▲

–Samuel A. Rumore, Jr.
Chair, Alabama Lawyers Hall of Fame Selection Committee



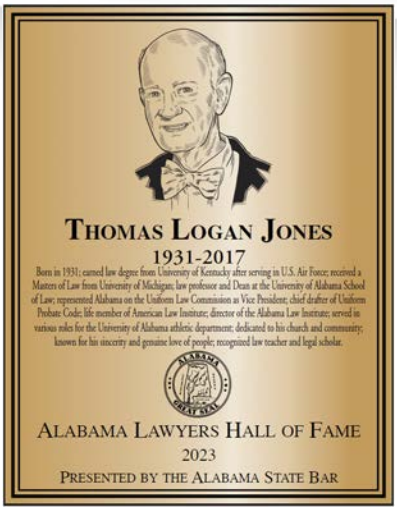
ALBERT PRESTON BREWER 1928-2017

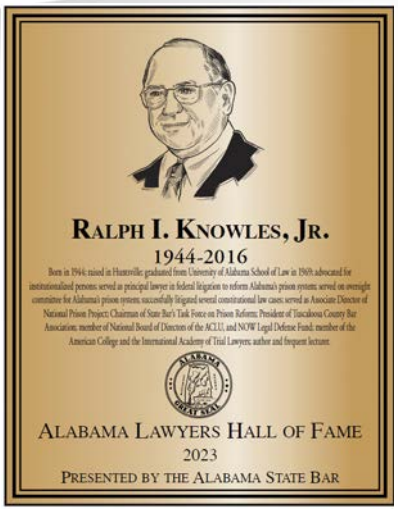
Born in 1928; earned law degree from University of Alabama School of Law in 1952; practiced in Decatur; served in Alabama House of Representatives for three terms; elected Speaker of the House; elected Lieutenant Governor; succeeded to the office of Governor in 1968; narrowly lost aggressive 1970 Governor's election; returned to practice in 1971; only person in state history to serve as Speaker of the House, Lieutenant Governor and Governor in succession; became a professor at Cumberland School of Law in 1987; helped establish Public Affairs Research Council of Alabama (PARCA); known as a man of great wit, keen intellect, and lion-hearted courage.

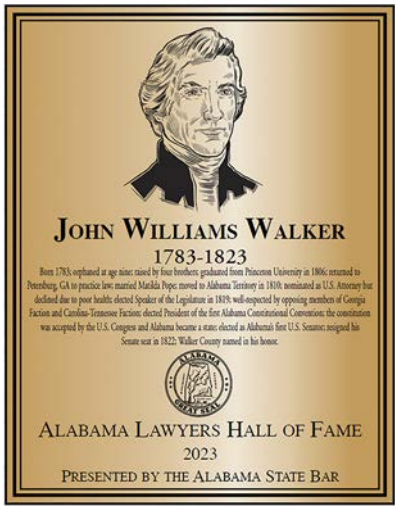


J.L. CHESTNUT, JR. 1930-2008

Born in 1930 in Selma, Alabama; attended Talladega College, Dillard University, and Howard University School of Law; drafted into U.S. Army while in law school; opened his practice in Selma in 1959 as one of only nine black lawyers in Alabama; represented Southern Christian Leadership Conference and Martin Luther King, Jr.; present on Bloody Sunday; firm became the largest black law firm in Alabama; filed civil rights cases to have blacks allowed on juries and to desegregate schools; one of the lead counsels for black farmers against the U.S. Department of Agriculture; recognized as a lawyer-leader in Alabama civil rights law.







THOMAS LOGAN JONES
1931-2017

Born in 1931; earned a law degree from the University of Kentucky after serving in U.S. Air Force; received a Master of Law from the University of Michigan; law professor and Dean at the University of Alabama School of Law; represented Alabama on the Uniform Law Commission as Vice President; chief drafter of Uniform Probate Code; life member of American Law Institute; director of the Alabama Law Institute; served in various roles for the University of Alabama athletic department; dedicated to his church and community; known for his sincerity and genuine love of people; recognized law teacher and legal scholar.

RALPH I. KNOWLES, JR.
1944-2016

Born in 1944; raised in Huntsville; graduated from University of Alabama School of Law in 1969; advocated for institutionalized persons; served as principal lawyer in federal litigation to reform Alabama's prison system; served on oversight committee for Alabama's prison system; successfully litigated several constitutional law cases; served as Associate Director of National Prison Project; Chairman of State Bar's Task Force on Prison Reform; President of Tuscaloosa County Bar Association; member of National Board of Directors of the ACLU, and NOW Legal Defense Fund; member of the American College and the International Academy of Trial Lawyers; author and frequent lecturer.

JOHN WILLIAMS WALKER
1783-1823

Born in 1783; orphaned at age nine; raised by four brothers; graduated from Princeton University in 1806; returned to Petersburg, GA to practice law; married Matilda Pope; moved to Alabama Territory in 1810; nominated as U.S. Attorney but declined due to poor health; elected Speaker of the Legislature in 1819; well-respected by opposing members of Georgia Faction and Carolina-Tennessee Faction; elected President of the first Alabama Constitutional Convention; the constitution was accepted by the U.S. Congress and Alabama became a state; elected as Alabama's first U.S. Senator; resigned his Senate seat in 1822; Walker County named in his honor. ▲

ALABAMA LAWYERS HALL OF FAME

PAST INDUCTEES

2022
Harold Vaughan Hughston (1915-1981)
James Taylor Jones (1832-1895)
Arthur Alexander Madison (1883-1957)
Clarence Frost Rhea (1921-2005)
Janie Ledlow Shores (1932-2017)

2021
Charles Baker Arendall (1915-1993)
Jerome Alfred Cooper (1913-2003)
Douglas Philip Corretti (1921-2009)
William Hooper Councill (1849-1909)
James Oscar Sentell, Jr. (1909-1985)

2020
Jane Kimbrough Dishuck (1923-2009)
William Burton Hairston, Jr. (1924-2015)
Helen Shores Lee (1941-2018)
Henry Minor (1783-1838)
Cecil Howard Strawbridge (1906-1999)

2019
Clifford J. Durr (1899-1975)
Broox G. Garrett (1915-1991)
Henry W. Hilliard (1808-1892)
Richard T. Rives (1895-1982)
Ellene G. Winn (1911-1986)

2018
Jeremiah Clemens (1814-1865)
Carl Atwood Elliott (1913-1999)
Robert Austin Huffaker, Sr. (1944-2010)
Henry Upson Sims (1873-1961)
George Peach Taylor (1925-2008)

2017
Bibb Allen (1921-2007)
Mahala Ashley Dickerson (1912-2007)
John Cooper Godbold (1920-2009)
Alto Velo Lee, III (1915-1987)
Charles Tait (1768-1835)

2016
William B. Bankhead (1874-1940)
Lister Hill (1894-1984)
John Thomas King (1923-2007)
J. Russell McElroy (1901-1994)
George Washington Stone (1811-1894)

2015
Abe Berkowitz (1907-1985)
Reuben Chapman (1799-1882)
Martin Leigh Harrison (1907-1997)
Holland McTyeire Smith (1882-1967)
Frank Edward Spain (1891-1986)

2014
Walter Lawrence Bragg (1835-1891)
George Washington Lovejoy (1859-1933)
Albert Leon Patterson (1894-1954)
Sam C. Pointer, Jr. (1934-2008)
Henry Bascom Steagall (1873-1943)

2013
Marion Augustus Baldwin (1813-1865)
T. Massey Bedsole (1917-2011)
William Dowdell Denson (1913-1998)
Maud McLure Kelly (1887-1973)
Seybourn Harris Lynne (1907-2000)

2012
John A. Caddell (1910-2006)
William Logan Martin, Jr. (1883-1959)
Edwin Cary Page, Jr. (1906-1999)
William James Samford (1844-1901)
David J. Vann (1928-2000)

2011
Roderick Beddow, Sr. (1889-1978)
John McKinley (1780-1852)
Nina Miglionico (1913-2009)
Charles Morgan, Jr. (1930-2009)
William D. Scruggs, Jr. (1943-2001)

2010
Edgar Thomas Albritton (1857-1925)
Henry Hitchcock (1792-1839)
James E. Horton (1878-1973)
Lawrence Drew Redden (1922-2007)
Harry Seale (1895-1989)

2009
Francis Hutcheson Hare, Sr. (1904-1983)
James G. Birney (1792-1857)
Michael A. Figures (1947-1996)
Clement C. Clay (1789-1866)
Samuel W. Pipes, III (1916-1982)

2008
John B. Scott (1906-1978)
Vernon Z. Crawford (1919-1985)
Edward M. Friend, Jr. (1912-1995)
Elisha Wolsey Peck (1799-1888)

2007
John Archibald Campbell (1811-1889)
Howell T. Heflin (1921-2005)
Thomas Goode Jones (1844-1914)
Patrick W. Richardson (1925-2004)

2006
William Rufus King (1776-1853)
Thomas Minott Peters (1810-1888)
John J. Sparkman (1899-1985)
Robert S. Vance (1931-1989)

2005
Oscar W. Adams (1925-1997)
William Douglas Arant (1897-1987)
Hugo L. Black (1886-1971)
Harry Toulmin (1766-1823)

2004
Albert John Farrah (1863-1944)
Frank M. Johnson, Jr. (1918-1999)
Annie Lola Price (1903-1972)
Arthur Davis Shores (1904-1996)

The Alabama Lawyers Hall of Fame is located on the ground floor of the Heflin-Torbert Judicial Building, 300 Dexter Avenue, Montgomery, Alabama 36104.

Marc A. Starrett

Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.

J. Thomas Richie

J. Thomas Richie is a partner at Bradley Arant Boult Cummings LLP, where he co-chairs the class action team. He litigates procedurally-complex and high-stakes matters in Alabama and across the country. Richie is a 2007 summa cum laude graduate of the Cumberland School of Law and former law clerk to the Hon. R. David Proctor of the United States District Court for the Northern District of Alabama.

Recent Criminal Decisions
From the U.S. Supreme Court

Ineffective Assistance of Counsel

***Thornell v. Jones*, 144 S. Ct. 1302 (2024):** In light of the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), the Ninth Circuit Court of Appeals erred in granting habeas relief on the defendant's claim that his attorney rendered ineffective assistance at sentencing by not presenting certain mitigating evidence. The Supreme Court found that the evidence was weak and likely would not have changed the result, particularly given the strength of the aggravating circumstances, which included "multiple homicides, cruelty, pecuniary motivation, and murder of a child[.]" The Court of Appeals "downplayed" the aggravating factors and "overstated the strength" of the mitigating evidence in granting relief.

Armed Career Criminal Act; Sentence Enhancement

***Brown v. United States*, 144 S. Ct. 1195 (2024):** The Armed Career Criminal Act, 18 U.S.C. § 924 *et. seq.*, a recidivist statute that focuses on a defendant's history of criminal activity to determine his "culpability and dangerousness," in part provides for harsher punishments where the defendant has "three previous convictions" for "a serious drug offense." The Court held that a state crime constitutes a "serious drug offense" if it involved a drug that was on the federal controlled substance schedules when the defendant possessed or trafficked in it, regardless of whether the drug was later removed from the schedules.

From the Eleventh Circuit Court of Appeals

Oral Pronouncement of Sentence; Clerical Error

***United States v. Zano*, No. 23-12716 (11th Cir. June 4, 2024):** Where the district court pronounces a sentence in open court that was contrary to its written order, the "oral pronouncement … must control." The Court of Appeals noted that sentence imposed in the written order's sentence exceeded the statutory maximum for the offense.

Sentence Variance

***United States v. Hayes*, No. 23-13769 (11th Cir. May 30, 2024):** The drug trafficking defendant, whose sentence was harsher than that provided by the sentencing guidelines, was not entitled to notice that the district court would vary from the guidelines as a result of his role in the offense and criminal history. Distinguishing between a "variance" and a "departure," the Court of Appeals held that notice only has been required if the sentence was a "departure," *i.e.*, a non-Guidelines sentence.

Capital Murder; Death Penalty

***Mills v. Hamm*, 102 F.4th 1245 (11th Cir. 2024), *cert. denied*, No. 23A1065 (U.S. May 30, 2024):** The Court of Appeals refused to stay a death sentence imposed in 2007 on a capital murder defendant who killed his elderly victims with a machete, tire tool, and hammer. It found that the defendant was not likely to succeed on his Sixth, Eighth, and Fourteenth Amendment claims and that his "inequitable conduct" in seeking a last-minute delay weighed against staying the sentence. Noting that interference with the state's interest in enforcing its criminal judgments would be "undue," the Court of Appeals also observed that the "public's interest in seeing its 'moral judgment' … carried out promptly is the State's interest too."

Appeal From Denial of Motion to Unseal Search Warrant

***Burke v. United States*, No. 23-13649 (11th Cir. May 24, 2024):** The Court of Appeals dismissed the defendant's appeal from the denial of his motion to unseal a search warrant affidavit, finding that the order was not appealable because it was tied to an ongoing criminal prosecution. The denial of the motion did not qualify for immediate appellate review under the collateral order doctrine, which allows for immediate review of orders disposing of motions to reduce bail, to dismiss on double jeopardy grounds, and to dismiss under the Speech or Debate Clause, as well as orders permitting involuntary medication to restore competence to stand trial.

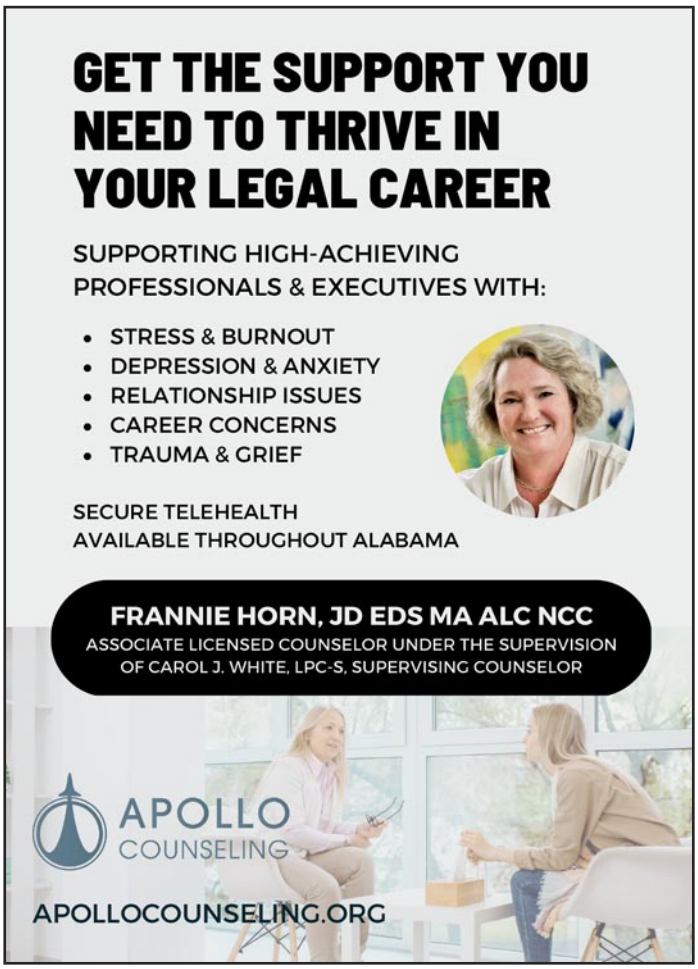
Conditions of Supervised Release; Access to Courts

***United States v. Etienne*, 102 F.4th 1139 (11th Cir. 2024):** After the defendant pleaded *nolo contendere* to charges alleging that he threatened to assault and murder a federal magistrate judge and a courtroom deputy, the district court did not err in imposing special conditions for the defendant's supervised release that prohibited him from visiting or calling certain courthouses or judges. As a matter of first impression, the Court of Appeals held that the conditions did not "absolutely bar his access to the federal courts," noting that the defendant "need not visit a courthouse himself or call a judge or court facilities to conduct court business. He still enjoys sufficient access."

From the Alabama Supreme Court

Ala. R. Crim. P. 32

***Greene v. Patterson*, No. SC-2023-0945 (Ala. May 3, 2024):** The circuit court correctly granted an assistant district attorney's motion to dismiss a civil complaint filed against him that, in substance, sought relief from the inmate-plaintiff's rape, sodomy, and sexual abuse convictions. Noting that Ala. R. Crim. P. 32 "displaces all post-trial remedies" other than motions under Ala. R. Crim. P. 24 and appeal, the Supreme Court concluded that the inmate had "attempted to use a civil action to challenge the propriety of his convictions by suing the prosecuting attorney[,]" and that "a state prisoner … may not use a rule of civil procedure to collaterally attack a criminal judgment[.]"



(Continued from page 199)

From the Alabama Supreme Court

Service of Process

***Ex parte Foremost Ins. Co.*, No. SC-2023-0759 (Ala. May 10, 2024)**. The Alabama Supreme Court granted a writ of mandamus directing the circuit court to dismiss a proposed amended complaint. As the insurer, the proposed amendment, which was filed within 42 days of the first trial setting, (a) was not supported by good cause because the plaintiff knew the facts supporting the complaint before discovery and (b) would cause actual prejudice to the insurer by expanding the scope of claims and issues after discovery. As to the agency-side defendants, the court first held that the issue of service of process raised "a matter of importance beyond the basic issues in dispute" supporting mandamus review (and did so on grounds that appear to apply to every challenge to service), and then decided that service on both the individual and agency defendant was improper based on the documents in the record.

Arbitration

***Jamison v. SNH AL Crimson Tenant, Inc.*, No. SC-2023-0861 (Ala. May 17, 2024)**. The circuit court's failure to allow a non-moving party to respond to late-submitted materials supporting a motion to compel arbitration was held not to be harmless because the timely-submitted materials did not include substantial evidence of the existence of a valid arbitration agreement signed by a representative with the authority to bind the party through whom the plaintiff brought suit. Accordingly, the Alabama Supreme Court reversed the order compelling arbitration and remanded for further proceedings.

Appellate Jurisdiction

***Coprich v. Jones*, No. SC-2023-0675 (Ala. June 21, 2024)**. The Court transferred to the Court of Civil Appeals an appeal relating to a request to set aside a deed. It determined that, in relevant part, the Court of Civil Appeals has jurisdiction to decide cases involving requests for equitable relief as long as the action is a civil action and the amount in controversy does not exceed the $50,000 jurisdictional threshold.

Civil Procedure

***Ex parte Nat'l Trust Ins. Co.*, No. SC-2023-0515 (Ala. May 24, 2024)**. An insurer filed a federal declaratory judgment action relating its obligation to cover a contractor relating to a fatal accident. Later, and in a lawsuit relating to the accident, filed in state court a third-party complaint asserting breach of contract and bad faith against the insurer relating to the same accident. The Alabama Supreme Court found that the third-party complaint was barred by Alabama's abatement statute, § 6-5-440, insofar as it related to the contractor's obligation to indemnify the prime contractor because the third-party claims are compulsory counterclaims in the federal action that was pending first and all of the relevant facts (including the obligation of the contractor to indemnify the prime contractor) had occurred before the contractor answered the federal action. However, the Alabama Supreme Court held that the third-party complaint against the insurer was not barred by Section 6-5-440 insofar as it related to the insurer's obligation to indemnify the insurer's obligation to indemnify the contractor for the settlement of the underlying plaintiff's claim.

***Greene v. Patterson*, No. SC-2023-0945 (Ala. May 3, 2024)**. A plaintiff cannot raise double-jeopardy arguments by filing a civil action under Alabama Rule of Civil Procedure 60(b). The sole mechanism for doing so is Rule 32 of the Alabama Rules of Criminal Procedure, except to the extent Criminal Rule 24 applies.

***Ex parte Hare, Wynn, Newell & Newton, LLP*, No. SC-2023-09908 (Ala. May 24, 2024)**. In a civil action in which all named defendants were dismissed but fictitious defendants remained, the Alabama Supreme Court issued a writ of mandamus directing the circuit court to dismiss the action as to a defendant the plaintiff attempted to name more than 30 days after the last named defendants had been dismissed. The presence of fictitious defendants does not keep a judgment from becoming final, and the listing of the case as "active" on AlaCourt was not relevant.

Church Property

***Aldersgate United Methodist Church of Montgomery v. Alabama-West Florida Conference of the United Methodist Church, Inc.*, No. SC-2023-0830 (Ala. May 31, 2024)**. The Court affirmed dismissal of a suit asserting that members of

a church had the right to vote on issues of disaffiliation, finding that the case could not be decided without necessarily deciding ecclesiastical matters, something the Court has found to be beyond its jurisdiction.

***Ex parte The Alabama-West Florida Conference of the United Methodist Church, Inc.*, No. SC-2023-0385 (Ala. April 24, 2024)**. The Alabama Supreme Court held that the Circuit Court had subject matter jurisdiction over a property dispute between a church and the conferences to which it used to belong. The court determined that the defendant conferences that had filed the mandamus petition failed to carry their burden of showing that the church's complaint could not be decided by applying neutral principles of law to the language of the deed, charter, statutes, and other relevant provisions. It found the First Amendment to be no bar to the application of neutral principles that did not require deciding a religious controversy. The result was unanimous but did not produce a majority opinion.

COVID Immunity Act

***Ex parte Triad of Alabama, LLC*, No. SC-2023-0395 (Ala. Jan. 26, 2024)**. Though 8-0 in the result that a hospital was entitled to writ of mandamus finding it immune under the Alabama COVID-19 Immunity Act for a claim arising from the plaintiff slipping and falling while using an "infusion entry," only two justices concurred with the main opinion and six concurred with the result.

Parental Claims

***Deaton v. South Highland Child Development Center, Inc.*, No. SC-2023-0484 (Ala. June 7, 2024)**. In a case against a day care facility related to whether a custodial parent could pick up a child, the Court held that a day-care does not owe a duty to a parent regarding parental pickup that goes beyond the duty imposed by DHR regulations—that is, maintaining a pickup list established by a parent or guardian. This lack of an independent duty caused the Alabama Supreme Court to affirm dismissal of the negligence

(Continued from page 201)

and wantonness claims. Similarly, the Court affirmed dismissal of an outrage claim, noting that a daycare caught between a dispute between parents does not engage in extreme and outrageous conduct by complying the applicable DHR regulations. Lastly, the Court held that the day care did not interfere with the plaintiff mother's parental rights because the day-care could not be found to have "enticed" or "harbored" the child by the act of relinquishing custody to the father instead of the mother.

Consent Judgments

***Orange Beach v. The Lamar Cos.*, No. SC-2023-0657 (Ala. May 17, 2024)**. The Alabama Supreme Court reversed a circuit court's failure to enforce a 12-year old consent judgment relating to the removal of certain signs, noting that consent judgments are interpreted just like contracts, that the complaining party had waived the right to complain about selective enforcement by entering a consent decree, and that the complaining party could not litigate matters arising after the consent decree in the action that concluded with the entry of the consent decree.

Contractual Indemnity, Set Off, and Attorneys' Fees

***Alabama Plating Tech., LLC v. Georgia Plating Tech, LLC*, No. SC-2023-0250 (Ala. June 21, 2024)**. This case involves the close reading of an individually negotiated asset purchase agreement. A party with a contractual indemnification right was found to have timely invoked that right and the counterparty was found not have timely objected. The counterparty was not entitled to rely on the indemnified party's right to conduct a diligence inspection to avoid a warranty. The Court held that the indemnified party properly applied a provision of the agreement related to set-off. As to attorneys' fees, the Court held that a litigant is a "prevailing party" if a judgment is rendered in its favor and a court has awarded it some relief, and that the indemnified party was entitled to its attorneys' fees as a prevailing party. The counterparty was not found to be a prevailing party (even though it prevailed on some claims) because it was not awarded any relief.

Real Estate Purchases

***Iskra v. Bear Roofing, LLC*, No. SC-2023-0524 (Ala. June 14, 2024)**. While purchasers of real estate were not found to be intended third party beneficiaries of a contract to perform certain repairs at the real estate they were purchasing, the Alabama Supreme Court found substantial evidence that the purchasers were covered by a warranty related to the repairs and that the purchasers could pursue negligence claims against the repairer because the there was evidence that the repairer knew about the purchaser and that the purchaser had relied upon the repairer in purchasing the house.

Right of Way

***Coats v. Ayers*, No. SC-2023-0134 (Ala. June 14, 2024)**. Statutory rights-of-way under Section 18-3-1 were at issue, with the Alabama Supreme Court finding that the first property at issue was properly considered a single property, despite the proponents of the right-of-way contending that it was properly considered two properties—one with access to a pubic road and the other landlocked. The proponents' evidence showed that accessing all of the properties would be difficult and expensive because of a creek, but the Court held that "the plain language of § 18-3-1 does not allow landowners to seek a right-of-way over the property of another simply because they have no reasonable, adequate means to access parts of their property." Summary judgment was thus affirmed to this property. However, as to the second property, the Court found that there was substantial evidence tending to show that the property owners had consensual access to an adjacent tract to reach a public road, and that the existence of such proof precluded summary judgment on a statutory right-of-way.

Ejectment and Contempt

***Coan v. Championship Property, LLC*, No. SC-2023-0740 (Ala. May 31, 2024)**. The trial court acted within its discretion in ordering a defendant to deposit an amount approximately equal to her mortgage payment into court and in sanctioning the defendant for failing to do so. But the Alabama Supreme Court found that the trial court erred by awarding the foreclosing plaintiff possession of the property as a sanction against the defendant for contempt—finding that "the sanction is counterintuitive to the current posture of the litigation and, therefore, not appropriate."

Immunity and Claim Preclusion

***McGilvray v. Perkins*, No. SC-2023-0966 (Ala. June 21, 2024)**. After being fired for allegedly sending inappropriate

email, an investigator for the Medical Board sued the Medical Board. The Alabama Supreme Court held that the Medical Board members were immune from the investigator's breach of contract claim, it does not shield them from injunctive relief claims and claims demanding they perform their official duties. Nevertheless, the Court held that all of the remaining claims were barred by the doctrine of res judicata—the investigator having previously filed an action for the same relief and lost at the summary judgment stage because the circuit court found his claims to be time barred.

Landlord/Tenant

***Ex parte Housing Auth. of Talladega*, No. SC-2023-0537 (Ala. May 24, 2024)**. The Alabama Supreme Court granted certiorari from the Court of Civil Appeals to clarify that Alabama applies §§ 360 and 361 of the Restatement (First) of Torts and Restatement (Second) of Torts as they pertain to "open and obvious" dangers, but it does not apply the "more liberal" § 343A from the Second Restatement—which bars recovery arising from open and obvious risks except where the possessor should anticipate the harm despite the obviousness.

Livestock

***Edwards v. Crowder*, No. SC-2023-0151 (Ala. May 24, 2024)**. The Alabama Supreme Court clarified that Alabama Code Section 3-5-3(a) creates an exclusive cause of action for recovery of injuries caused by livestock on a public road and that there is no common-law cause of action. Accordingly, in an action arising out of injuries caused by an accident involving horses on a public road, it affirmed summary judgment for all parties that did not own the horses because Section 3-5-3 permits no such claim. It also affirmed summary judgment for the owners because there was no indication that the owners had knowingly or willfully put their horses on the road.

Malicious Prosecution

***Svensen v. Hester*, No. SC-2023-0680 (Ala. May 17, 2024)**. A party who received a bad check swore out an affidavit against the check's maker that stated, among other things, that the bad check had been made out in the last 12 months. The maker was arrested but charges against him were dismissed because the statute of limitations had run. The maker sued the recipient for malicious prosecution, and the Alabama Supreme Court held that summary judgment was properly entered for the recipient. The court reasoned that the recipient had probably cause to believe that all of the elements of negotiating a worthless instrument were present, and "the expiration of the limitations period has nothing to do with whether the defendant actually committed the offense charged." Even though there was evidence that the recipient's affidavit was incorrect as to when the check was made out, there was no evidence that the recipient knew about the limitations issue or that the prosecution was actually time-barred.

Probate

***Ex parte McLeroy*, No. SC-2023-0636 (Ala. May 31, 2024)**. Because final settlement procedures had been begun in the probate court, the removing party's right to removal had been cut off and the circuit court should have remanded an estate proceeding to the probate court. The test is bright line: what matters is whether final settlement has begun, not whether it is proper.

Receivership

***The Water Works & Sewer Bd. of Pritchard v. Synovus Bank*, No. SC-2023-0881 (Ala. May 17, 2024)**. Affirming the circuit court's appointment of a receiver, the Alabama Supreme Court clarified that circuit courts should consider both contractual and equitable bases when deciding whether to appoint a receiver. The Alabama Supreme Court also held that the absence of a receivership remedy is the statute under which the defaulted debt obligations were issued did not preclude the appointment of a receiver because the statute gave the issuing entity the power to enter into contracts on terms the issuing entity deemed advisable—something the court found broad enough to encompass a receivership remedy.

Real Property

***F Family South, LLC v. Property Owners Ass'n of Ono Island, Inc.*, No. SC-2023-0341 (Ala. May 17, 2024)**. The Court reversed the trial court's decision to invalidate a tax sale long after the 20-year rule of repose, rejecting the argument that the judicial redemption statute applied. The trial court did not reach the judicial redemption issue (which is never time barred), ruling instead on the basis of defects in the tax sale—a challenge that is subject to a 20-year repose. The Alabama Supreme Court affirmed the trial court's determination that restrictive covenants binding property on the island at issue remained in effect.

Trusts, Special Masters

***Ex parte Marshall*, No. SC-2023-0894 (Ala. May 31, 2024)**. The Alabama Supreme Court held the attorney general has standing under § 19-3B-110(d) to invoke the circuit court's jurisdiction assume control over a trust and to administer the trust according to its terms. It also held that no "exceptional condition" existed to justify referring either the entire case or the issue of accounting to a special master.

(Continued from page 203)

Accrual of Underinsured Motorist Claim

***Ex parte State Farm Mut. Auto. Ins. Co.*, No. SC-2023-0528 (Ala. April 5, 2024)**. For statute of limitations purposes, Alabama Supreme Court held that a claim for underinsured motorist benefits accrues on the date of the accident and not on the date of the resolution of the insured's claim of the underinsured motorist. The court primarily relied on the existence of a direct claim, in which the plaintiff sues both the alleged tortfeasor and an insurer from which the plaintiff is legally entitled to recover damages. Because a plaintiff can bring a direct claim as soon as an accident occurs, the court reasoned that the accident must be the event that triggers the running of the statute. The court issued a writ of mandamus directing the trial court to dismiss the direct claim for underinsured motorist benefits. The court did not consider whether State Farm had sufficient notice of the claim under Lowe, as that issue was not decided below and not briefed on appeal. The court also did not reach the issue of whether the plaintiff's claim for breach of contract could survive the dismissal of the claim for underinsured motorist benefits.

Forum Selection

***Ex parte COWS USA, LLC*, No. SC-2023-0454 (Ala. April 5, 2024).** The Court issued a writ of mandamus directing the circuit court to dismiss the plaintiffs' claims against a group of defendants that were subject to a mandatory outbound forum selection clause—even though there were other defendants not subject to that clause. The court reasoned that the forum selection clause required plaintiffs to sue the defendants who were parties to that agreement in the required forum, and the hardship accruing to the plaintiffs on account of litigating against the remaining defendants in the original forum resulted from the plaintiffs' choice to pick a forum different than the one required by the mandatory outbound forum selection clause.

Alabama Litigation Accountability Act, Mandate Rule

***S&M Assocs. v. Players Recreational Group, LLC*, No. SC-2023-0394 (Ala. April 12, 2024)**. In a second appeal following remand, the Alabama Supreme Court held that a trial court was correct in deeming an Alabama Litigation Accountability Act implicitly denied after the circuit court did not specifically reserve jurisdiction on it in connection with the first appeal. It also affirmed the circuit court's decision not to award attorneys' fees on remand. But the Alabama Supreme Court reversed the circuit court's judgment to the extent that judgment addressed the priority of a mortgage recorded by one of the parties, finding that reaching that topic exceeded the scope of the mandate from the prior appeal.

Preemption of Ordinances, Motor Scooters

***City of Gulf Shores v. Coyote Beach Sports, LLC*, No. SC-2023-0637 (Ala. April 12, 2024).** Reversing the circuit court, the Alabama Supreme Court held that a municipal ordinance requiring motor scooter operators to have a class-M license (or analogous class from another state) as a condition of renting a scooter was not preempted by Alabama's general licensure statutes. The court found a lack of field or conflict preemption over the ordinance because the ordinance applied to the act of renting, while the licensure statutes applied to the act of operating certain vehicle classes.

Birmingham/Bessemer Jurisdiction and Venue

***State of Alabama v. Jay's Charity Bingo*, No. SC-2023-0314 (Ala. April 19, 2024)**. The Alabama Supreme Court reaffirmed the rule that the term "jurisdiction" in the Bessemer Act, Local Act No. 213 of 1919, has been will continue to be interpreted to refer instead to venue. Thus, the court found that actions arising in the Bessemer Cutoff but filed in Birmingham were subject to transfer to the proper division, but that the Birmingham division had jurisdiction such that the actions were no nullities. The Court reversed the Bessemer Circuit Court's decision to dismiss the cases and ordered the Circuit Court to proceed with the State's requests for preliminary injunctions in the cases.

Immunity

***Ex parte City of Montgomery*, No. SC-2023-0735 (Ala. April 19, 2024)**. The Alabama Supreme Court found that two officers enjoyed state agent immunity arising from wrongful death claims arising from a police shooting. The Court found that no regulations prohibited the officers from approaching a car believed to be stolen with their sidearms drawn and that a requirement that deadly force be used only as a last resort did not change that analysis. It also concluded that the officers were entitled to believe that one of

them faced the imminent use of deadly physical force when there was an officer knocked to the ground near the wheels of a car and the driver of the car was attempting to use the car to escape. Finding the officers entitled to immunity, the Court likewise found that the city was entitled to summary judgment, as the only theory of liability against the city was vicarious liability. The Court issued a writ of mandamus.

Alabama Litigation Accountability Act, Malicious Prosecution, Abuse of Process

***Seibert v. Stricklen*, No. SC-2023-0741 (Ala. April 26, 2024).** The Alabama Supreme Court affirmed summary judgment for the defendants on malicious prosecution and abuse of process claims, but reversed on the award of attorneys' fees under the Alabama Litigation Accountability Act. The Court reasoned that a defendant cannot be liable for malicious prosecution where a police officer initiates the prosecution and the defendants did nothing more than give information to the officer, even though the defendants arguably mischaracterized the nature of a judicial order against the plaintiff. Further, noting that the tort of abuse of process can relate solely events occurring after process has issued, the Court affirmed summary judgment for the defendants on abuse of process because the plaintiff's allegations related to the issuance of process itself. Lastly, the Court reversed the award of attorneys' fees under the ALAA, finding that the circuit court had not adequately explained its rationale for awarding fees.

From the Alabama Court of Civil Appeals

Immunity

***Ex parte Ala. Medical Cannabis Comm'n*, No. CL-2024-0073 (Ala. Civ. App. June 21, 2024).** Because an action against the Commission was styled as being against the Commission and not the individual commissioners, the Alabama Court of Civil Appeals found that Section 14 Immunity applied and stripped the circuit court of subject matter jurisdiction. It dismissed the mandamus petition as moot and directed the trial court to dismiss the case.

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(Continued from page 205)

Appellate Jurisdiction

***Norman v. Norman*, No. CL-2023-0531 (Ala. Civ. App. June 7, 2024)**. An order directing a mother to pay child support was a final order that conclusively adjudicated the final claim in a divorce action, therefore the mother had 42 days from the denial of her post-judgment motion related to that order to file an appeal. Her failure to do so rendered her appeal untimely in the judgment of the Alabama Court of Civil Appeals, so that could dismissed her appeal.

Interpleader/Liens

***Board of Trustees of the University of Alabama for its Division University of Alabama Hospital in Birmingham v. Richards*, No. CL-2023-0849 (Ala. Civ. App. June 7, 2024)**. The court reversed judgment apportioning funds from an interpleader, finding that the trial court's decision to award a hospital less than the amount of its lien under Section 35-11-370 was error. The court reversed and directed the trial court to enter judgment apportioning funds in accordance with the hospital's lien and, if the funds are not sufficient to satisfy the lien, to permit the hospital to seek complete satisfaction outside the context of the interpleader.

Civil Forfeiture

***Mitchem v. State*, No. CL-2023-0412 (Ala. Civ. App. May 3, 2024)**. The court reversed the circuit court's judgment forfeiting $6,646 in currency because it found that the judgment was against the great weight of the evidence. The state presented evidence that the currency's owner had been previously convicted of drug offenses, but it did not tie the currency to any specific drug transaction or rebut the owner's evidence that the seized money was given by the owner's father to allow the owner to buy a vehicle.

Civil Contempt

***Milton v. Delta Properties, LLC*, No. CL-2023-0421 (Ala. Civ. App. May 3, 2024)**. Because a prevailing party moving to hold a non-prevailing party in contempt for failure to comply with a previous judgment did not pay a filing fee before filing its motion, the Alabama Court of Civil Appeals held that the circuit court lacked jurisdiction to entertain the motion. It dismissed the appeal and directed the circuit court to dismiss the motion for contempt, though it noted that its order was without to prejudice to the prevailing party's ability to file a motion in the future.

Custody

***Ex parte R.B.*, No. CL-2023-0506 (Ala. Civ. App. May 24, 2024)**. The court determined that Alabama did not obtain "home state" jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act because the children at issue did not live in Alabama with their parents for six consecutive months. Two of the children at issue had lived with a foster parent, but a foster parent's custody is physical only––i.e., does not include legal custody––and therefore could not satisfy the residence requirement of Section 30-3B-102(13). Accordingly, the court issued a writ of mandamus requiring the trial court to dismiss the Alabama custody petitions brought by the foster parent for lack of subject matter jurisdiction.

Elder Abuse

***P.T.S. v. S.S.*, No. CL-2023-0673 (Ala. Civ. App. June 14, 2024)**. The court of civil appeals affirmed the trial court's decision to enter an elder abuse protection order under Alabama Code §§ 38-9F-1 et seq. because it found that the stepson against whom the order had been entered had engaged in financial exploitation of an elder by taking $25,000 out of an account in which he had no ownership interest. The stepson had argued that he had taken the money out of the account on the instructions of a person who did have an ownership interest, but the stepmother testified that both her and the account's other owner were surprised by the stepson's withdrawal of the funds. The court found that this evidence was sufficient to allow the trial court to conclude that the stepson had taken the stepmother's money without authorization.

Termination of Parental Rights

***M.G.S. v. Lee Cty. D.H.R.*, No. CL-2023-0102 (Ala. Civ. App. May 10, 2024)**. The court of civil appeals affirmed the juvenile court's determination that a mother facing termination of her parental rights received adequate assistance of counsel, even though the interpreter provided for the mother did not speak the mother's native language. The juvenile court was unable to find an interpreter speaking the mother's native language, but provided an interpreter that spoke Spanish, and the juvenile court determined through ore tenus evidence that the mother was sufficiently fluent in Spanish to communicate through the interpreter. The court likewise affirmed the juvenile court's determination that termination of parental rights was warranted.

Alimony

***Snyder v. Snyder*, No. CL-2023-0679 (Ala. Civ. App. May 17, 2024).** The court of civil appeals determined that an award of alimony that did not unequivocally appear to be alimony-in-gross was properly analyzed as periodic or rehabilitative alimony. In accordance with that determination, it reversed the award of alimony because the trial court did not make the findings required by Alabama Code § 30-2-57(a) or (b) (conditionally as to (b)).

Divorce

***Brown v. Brown*, No. CL-2023-0324 (Ala. Civ. App. June 28, 2024).** The court of civil appeals determined that the trial court's failure to hold a hearing on the wife's post-judgment motions was not harmless error because the wife had allegedly discovered new evidence. The trial court did not hold a hearing on that motion and the motion was denied by operation of law. Without reaching the merits of the wife's motion, the appellate court held that the failure to hold a hearing was not harmless error and required remanding for the trial court to hold a hearing.

Child Support

***Hunter v. Allen*, No. CL-2023-0544 (Ala. Civ. App. May 24, 2024).** The Alabama Court of Civil Appeals reversed the trial court's award of child support because the trial court did not hold a hearing on the father's post-judgment motion related to that issue. The trial court's final order required the father to pay a higher amount of child support than an interlocutory order required, but the court found that the change in amount was not adequately supported by the record. As a result, it could not hold that the failure to hold a hearing on the father's post-judgment motion was harmless. The court affirmed the trial court's visitation ruling.

Sealing

***Ex parte A.H.R.*, No. CL-2024-0024 (Ala. Civ. App. May 24, 2024).** The court reversed the trial court's decision to seal part of a record because it determined that the trial court did not make sufficient written findings supporting its decision: "Any order sealing any portion of a record must contain written findings that the movant has shown by clear and convincing evidence that the information contained in the record or portion thereof sought to be sealed meets at least one of the six categories set forth in *Holland*." ▲

▲ **Judge Philip Ben McLauchlin, Jr.**

▲ **David A. Simon**

Judge Philip Ben McLauchlin, Jr.

McLauchlin

Judge Ben McLauchlin of Ozark, a long-time circuit judge, died on January 10, 2024, at age 83. Having served the 33rd Judicial Circuit, composed of Dale and Geneva counties for 37 years, he retired in 2013 but continued serving as an active retired judge until 2022. At the time of his retirement, the Dale County Commission designated his courtroom as the "The McLauchlin Courtroom," recognizing his "dedication to the Rule of Law which he administered fairly, impartially, justly, and equally with integrity, humility, and compassion for all."

During Judge McLauchlin's tenure on the bench, he served as president of the Alabama Circuit Judges' Association, a member of the Alabama Sentencing Commission, and a member and chair of the Alabama Judicial Inquiry Commission. For his service to the bench and bar, the Alabama State Bar awarded him its Judicial Award of Merit in 2012.

Judge McLauchlin was a graduate of the University of Alabama's School of Commerce and Business Administration, graduating with a degree in accounting, and was a graduate of the University of Alabama School of Law, graduating with a Juris Doctor. During his time at the university, he was a member of Alpha Tau Omega social fraternity, sports editor for *The Corolla* yearbook, and a member of the *Alabama Law Review*.

Judge McLauchlin had a passion for University of Alabama football. He was regularly in attendance at games, always sporting a crimson-colored sports jacket and houndstooth hat, frequently mistaken for Bear Bryant and causing fans to request an autograph. From a young age, he and his father traveled together pursuing their love of baseball spring training in Florida, golf tournaments, and University of Alabama sporting events.

Judge McLauchlin served his country in the United States Army Reserve, served his community through a host of civic organizations, and served his church teaching a Sunday School class for many years. He was known for the respect and kindness he showed to all with whom he interacted.

Judge McLauchlin is survived by his wife of 50 years, Barbara Raymond McLauchlin; four children, Barbara McLauchlin Neal, Sandra Lynne McLauchlin, Clementine McLauchlin Johnson, and Philip Ben McLauchlin III; six grandchildren; and two great-grandchildren.

–Randall L. Cole, Retired Circuit Judge, Fort Payne

David A. Simon

Simon

On the 14th day of May 2024, David A. Simon, Sr. merged with the infinite, assumed room temperature, went home to Jesus, and escaped this mortal realm, casting off this mortal coil in hopes of exchanging it for eternal paradise or at least nothing bad. Esophageal cancer was the culprit here. He is survived by his wife of 42 years, Janice Crowder Simon, and two children, Catherine Simon Spann (Jody) and David A. "Boo" Simon, Jr. He is also survived by his brother, Richard Simon of Birmingham. Born on November 5, 1956 in Selma, his mother was merely traveling through the important civil rights city when the now-deceased first asserted himself.

Dave lived until he was five in Myrtlewood, Alabama in Marengo County. At age five he moved to Mobile and attended public schools there until graduation from Murphy High. He went on to the University of Alabama where he was Phi Beta Kappa and was inducted into several leadership honorary societies, including the Jasons, Omega Delta Kappa, Who's Who in American Colleges, and the Order of Omega Greek leadership honorary. As an undergraduate, he served as campus elections chair, as chief justice of the student court, as chief justice of the Interfraternity Council Court, and as president of his fraternity. After graduation, he was admitted to the University of Alabama School of Law, where he again served as an honor court justice.

He began legal practice in Bay Minette with James R. Owen and E.E. Ball. He practiced there for 32 years, before relocating his practice to Fairhope. Known as a courtroom lawyer, he was rated "AV" by Martindale Hubbell, its highest rating representing exceptional legal work. Although in general practice, his practice steered toward mostly family law (divorces and child custody disputes) and criminal law. Dave handled 38 murder cases in his career and thousands of divorces. In 1998 he was president of the Baldwin County Bar Association. He also served as vice president of the Alabama Criminal Defense Lawyers Association.

He never suffered fools gladly and usually let them know it. He loved the Alabama Crimson Tide and his friends. He loved fried foods, all kinds. He believed that Coca-Cola was the most perfect beverage ever created. The chirp of a cicada alone could make him happy, and when coupled with the song of a whippoorwill, he was in downright ecstasy. He loved Mardi Gras and was a long-time member of a Fairhope Mystic Society. He died living on Mobile Bay, which he also loved. He enjoyed baseball and local community theater. He was always terrifically proud of his family and his children's accomplishments.

Now, having taken that long, final, unknown, definitive journey, he leaves you behind to worry with this old world. Cremation will take place at the family's convenience, and his ashes will spread to various locations that he enjoyed in life. A small private remembrance service shall be conducted at an Eastern Shore establishment that serves adult beverages to toast the memory of the departed. ▲

Anne Christine Christensen
Andalusia
Died: Jan. 29, 2024
Admitted: Sept. 25, 2009

Alice George Davidson
Orange Beach
Died: Oct. 30, 2023
Admitted: Apr. 30, 1990

Wilson Maxwell Hawkins, Jr.
Mobile
Died: May 12, 2024
Admitted: July 30, 1970

Judith D'Alessandro Holt
Birmingham
Died: Apr. 6, 2024
Admitted: Sept. 26, 1988

Hon. Joseph James Jasper
Birmingham
Died: Feb. 3, 2024
Admitted: June 1, 1954

Robert Exum Minor
Lexington, VA
Died: Feb. 21, 2024
Admitted: Apr. 27, 1979

Brian O'Neal Noble
Birmingham
Died: May 28, 2024
Admitted: Sept. 23, 2010

General Robert Wheeler Norris
Birmingham
Died: May 12, 2024
Admitted: Feb. 24, 1955

Robert Franklin Prince
Tuscaloosa
Died: May 2, 2024
Admitted: Nov. 15, 1974

Sidney Owens Roebuck, Jr.
Birmingham
Died: Apr. 19, 2024
Admitted: Apr. 25, 1986

David Alan Simon
Fairhope
Died: May 14, 2024
Admitted: Apr. 23, 1982

Roman A. Shaul
roman.shaul@alabar.org

A non-lawyer may not represent a party in a court-ordered arbitration proceeding in Alabama

QUESTION:

May a non-lawyer represent a party in a court-ordered arbitration proceeding in Alabama?

ANSWER:

No, absent a federal or state statute allowing such, the representation of a party by a non-lawyer in a court-ordered arbitration proceeding in Alabama would constitute the unauthorized practice of law. Moreover, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and, where appropriate, to the attention of the court.

DISCUSSION:

The Disciplinary Commission of the Alabama State Bar has been asked to opine on whether the representation of a party by a non-lawyer in a court-ordered arbitration would constitute the unauthorized practice of law by the non-lawyer and, if so, what

duties would an attorney involved in the matter as an arbitrator or lawyer have to raise such issue in the arbitration or before the court. By way of background, Canon IV(C) of the Alabama Code of Ethics for Arbitrators and the American Arbitration Association Code of Ethics provides that "[t]he arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party." Some have interpreted this provision as allowing the representation of a party to an arbitration by a non-lawyer. However, the preamble to the Alabama Code of Ethics for Arbitrators also states that all provisions of the Code should be read in conjunction with applicable law. In addition, Rule 26 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures states that a party may be represented by "any other representative of the party's choosing unless such choice is prohibited by law."

As such, the question then becomes whether a non-lawyer may represent a party during an arbitration in Alabama or whether such representation would constitute the unauthorized practice of law. As a starting point, Rule 5.5, Ala. R. Prof. C., provides as follows:

Rule 5.5.

Unauthorized Practice of Law.

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of an activity that constitutes the unauthorized practice of law.

(b) Subject to the requirements of Rule VII, Rules Governing Admission to the Alabama State Bar (Admission of Foreign Attorneys Pro Hac Vice), a lawyer admitted in another United States jurisdiction but not in the State of Alabama (and not disbarred or suspended from practice in that or any jurisdiction) does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary or incidental basis (as defined below) in the State of Alabama. Services for a client are within the provisions of this subsection if the services:

(1) are performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, including transactional, counseling, or other nonlitigation services that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;

(2) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in this or in another jurisdiction; or

(3) are performed by an attorney admitted as an authorized house counsel under Rule IX of the Rules Governing Admission to the Alabama State Bar and who is performing only those services defined in that rule.

(c) A lawyer admitted to practice in another jurisdiction but not in the State of Alabama does not engage in the unauthorized practice of law in the State of Alabama when the lawyer renders services in the State of Alabama pursuant to other authority granted by federal law or under the law or a court rule of the State of Alabama.

(d) Except as authorized by these Rules or other law, a lawyer who is not admitted to practice in the State of Alabama shall not (1) establish an office or other permanent presence in this jurisdiction for the practice of law, or (2) represent or hold out to the public that the lawyer is admitted to practice law in Alabama.

(e) Practicing law other than in compliance with this rule or Rule VII or Rule VIII of the Rules Governing Admission to the Alabama State Bar, or other rule expressly permitting the practice of law, such as the Rule Governing Legal Internship by Law Students, shall constitute the unauthorized practice of law and shall subject the lawyer to all of the penalties, both civil and criminal, as provided by law.

Rule 5.5 does not state that representing a party in arbitration is not the practice of law. Rather, Rule 5.5 is, in part, a multi-jurisdictional practice rule that expressly allows attorneys licensed in other states to represent parties in arbitrations taking place in Alabama. In doing so, it does not expressly allow non-lawyers to represent parties in arbitration.

Obviously, if a state or federal statute or law specifically allows a non-lawyer to represent a party during an arbitration, such statute or law would control. However, the Disciplinary Commission is unaware of any Alabama Supreme Court opinion that addresses whether representation of a party during an arbitration proceeding would constitute the unauthorized practice of law. The Disciplinary Commission is also unaware of any law or statute that expressly permits or prohibits the representation of a party by a non-lawyer during an arbitration.

The Supreme Court of Alabama has previously stated that "the specific acts which constitute the unauthorized practice of law are and must be determined on a case-by-case basis."

(Continued from page 211)

Coffee Cty. Abstract and Title Co. v. State, ex rel. Norwood, 445 So.2d 852, 856 (Ala. 1983). As a starting point, § 34-3-6, Ala. Code 1975, which defines the practice of law, provides, in pertinent part, as follows:

> (a) Only such persons as are regularly licensed have the authority to practice law.
>
> (b) For the purposes of this chapter, the practice of law is defined as follows:
>
> Whoever,
>
> (1) In a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission, or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or
>
> (2) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or
>
> (3) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity on behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or
>
> (4) As a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims, or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.
>
> (c) Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or corporation in support of its title policies, to be retained in its files and not to be recorded.

In addition, the Supreme Court of Alabama has repeatedly held that the purpose of § 34-3-6 is to ensure that laymen do not serve others in a representative capacity in areas that require the skill and judgment of a licensed attorney. *Porter v. Alabama Ass'n of Credit Executives*, 338 So.2d 812 (Ala.1976).

It is the opinion of the Disciplinary Commission that under section (b)(1) of the UPL statute a non-lawyer may not represent a party during an arbitration absent an express federal or state statute or law allow for such. A non-lawyer representative would be making an appearance in a representative capacity. Moreover, it is presumed that during the arbitration, the non-lawyer representative would be introducing exhibits, conducting an examination of witnesses, including expert witnesses, objecting to exhibits, and making legal arguments on behalf of the party and/or providing legal advice to the party. Such activities generally require the skill and judgment of a licensed attorney and under the UPL statute constitute the practice of law.

In addition, Rule 5.5, Ala. R. Prof. C., prohibits a licensed Alabama lawyer from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." If a lawyer were to stay silent and allow a non-lawyer to represent a party in an arbitration, that lawyer would be aiding and abetting that non-lawyer in the unauthorized practice of law. As such, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and, where appropriate, to the attention of the court and the Office of General Counsel.

As always, if you have any questions about this opinion or another matter, please call us or email at *ethics@alabar.org*. ▲

YOUNG LAWYERS' SECTION UPDATE

Ryan J. Duplechin
ryan.duplechin@beasleyallen.com

The Alabama State Bar's Young Lawyers' Section (YLS) has been busy in the first half of 2024 with its annual Minority Pre-Law Conference (MPLC) in April and Orange Beach CLE in May. The YLS recently hosted the MPLC across the state, providing valuable insights and guidance to hundreds of high school students considering a legal path. The YLS received special recognition from the American Bar Association five years ago for our MPLC program, and somehow, it continues to improve each year.

Each MPLC conference in Huntsville, Birmingham, Mobile, and Montgomery offers students an opportunity to delve into the legal field, explore the prerequisites for law school admission, and engage in panel discussions around legal careers. Students also have the opportunity to witness a mock trial, in which students listen carefully to the evidence and participate in simulated jury deliberations. Attendees receive valuable insights from seasoned attorneys and judges, as well as ask questions and network with other students with similar legal aspirations.

Our MPLC Chair, Denzel Okinedo, worked tirelessly to coordinate and put on a memorable 2024 MPLC. A special thank-you also to this year's MPLC Committee and city chairs, Darius Crayton and Larry Boothe (Birmingham), Whitney Aboko-Cole (Huntsville), Matthew Smith (Mobile), and Miland Simpler and Chenelle Smith (Montgomery).

We also hosted our annual Orange Beach CLE at Perdido Beach Resort which brought together young lawyers from across Alabama. The theme, "Alabama Lawyers: Where We've Been, Where We Are, Where We're Going," involved several speakers and explored the rich history of Alabama's legal profession. From landmark cases to influential attorneys, participants gained a deeper appreciation for Alabama's legal beginnings as well as a modern look at current legal markets and what is to come. Attendees also enjoyed networking opportunities during the welcome reception, poolside social, and beach party.

If you missed either the MPLC or Orange Beach CLE this year, we would love to have you join us in April and May 2025. If you are interested in participating in these or any programs with the YLS, please reach out to me anytime. ▲

DISCIPLINARY NOTICES

- **Reinstatement**
- **Transfer to Inactive Status**
- **Surrender of License**
- **Suspensions**

Reinstatement

- Mobile attorney **Sidney Moxey Harrell, Jr.** was reinstated with conditions to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective February 9, 2024. Harrell was previously disbarred from the active practice of law on February 22, 2018. [Rule 28, Pet. No. 2023-328]

Transfer to Inactive Status

- Macon County attorney **Linda W.H. Henderson** was transferred to inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective February 7, 2024, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the February 7, 2024 order of the Disciplinary Board of the Alabama State Bar in response to a request by her conservator submitted to the Office of General Counsel requesting she be transferred to inactive status. [Rule 27(C), Pet. No. 2024-200]

Surrender of License

- On February 23, 2024, the Supreme Court of Alabama issued an order accepting the voluntary surrender of **Raymond James Hawthorne, Sr.'s** license to practice law in Alabama, with an effective date of February 5, 2024. [ASB Nos. 2020-540, 2020-775, 2021-772, 2022-987]

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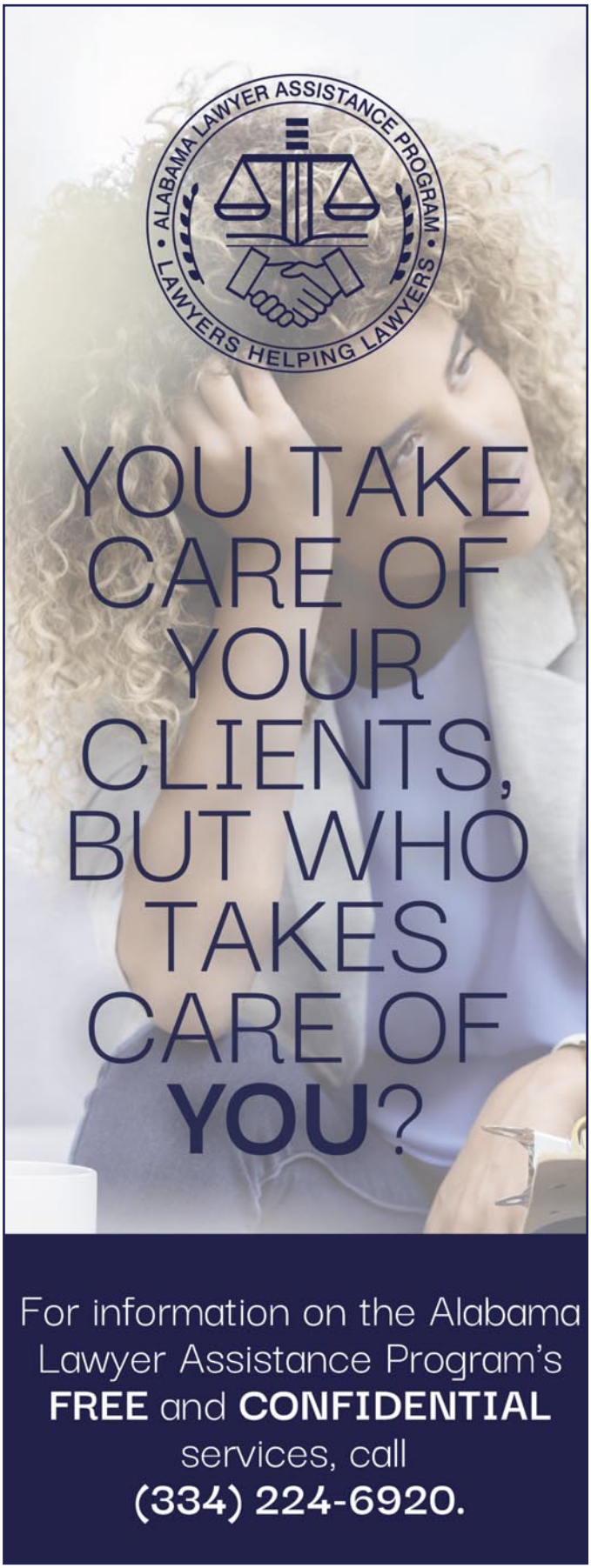
(Continued from page 214)

Suspensions

- Albertville attorney **Albert Dalton Chandler** was suspended from the practice of law for five years in Alabama by the Supreme Court of Alabama, effective April 11, 2024. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's acceptance of Chandler's conditional guilty plea, wherein Chandler pled guilty to violating Rules 1.15, 8.1, and 8.4 (c) and (g), Alabama Rules of Professional Conduct. [ASB Nos. 2023-408 and 2023-901]
- Dadeville attorney **Jackson Brett Harrison** was suspended from the practice of law in Alabama for five years, effective February 9, 2024. The suspension was based upon the Disciplinary Commission's acceptance of Harrison's conditional guilty plea, wherein he pled guilty in ASB No. 2021-123 to violating Rules 1.3 [Diligence], 1.4 [Communication], 1.5(c) [Fees], 1.15 [Safekeeping Property], 8.1(a) [Bar Admission and Disciplinary Matters], and 8.4(c), (d), and (g) [Misconduct], and in ASB No. 2021-396 to violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15 [Safekeeping Property], 8.1(a) [Bar Admission and Disciplinary Matters], and 8.4(c), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. [ASB Nos. 2021-123 and 2021-396]
- Braselton, Georgia attorney **Kimberly Murphree Partain** was summarily suspended from the practice of law in Alabama by the Disciplinary Commission of the Alabama State Bar, effective March 18, 2024, for repeatedly failing to appear for a public reprimand before the board of bar commissioners. [Rule 20(a), Pet. No. 2024-372]
- Parrish, Alabama attorney **Jeffrey Grant Rainer** was summarily suspended from the practice of law in Alabama by the Disciplinary Commission of the Alabama State Bar, pursuant to Rule 20a, Alabama Rules of Disciplinary Procedure, effective January 29, 2024, for his repeated failure to abide by discipline imposed by the Disciplinary Commission of the Alabama State Bar. After Rainer complied with a request to pay restitution to his former client and set up a payment plan for the disciplinary costs/fines, the Disciplinary Commission dissolved the summary suspension on March 8, 2024. The Alabama Supreme Court noted the dissolution of the summary suspension effective March 8, 2024. [Rule 20(a), Pet. No. 2024-225] ▲



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John Pennington and **Abbey Clarkson** announce the opening of **Clarkson Pennington Law LLC** with offices in Birmingham and Fort Payne.

Among Firms

Bressler, Amery & Ross PC announces the addition of **Jessica Bonds** to the Birmingham office.

Fisher Phillips announces that **Catherine "Ree" Harper** joined as a partner in the Atlanta office.

Massey, Stotser & Nichols PC of Birmingham announces that **Emily McClendon** joined the firm.

Norris Injury Lawyers PC announces that **Nathan Evans**, **Alex Alred**, and **Miles Turney** joined the firm.

Outside Chief Legal LLC announces the addition of **Ben Kilborn, Jr.**.

Porterfield, Harper, Mills, Motlow & Ireland PA announces that **Joel S. Isenberg** and **Matthew W. Nicholson** joined the firm.

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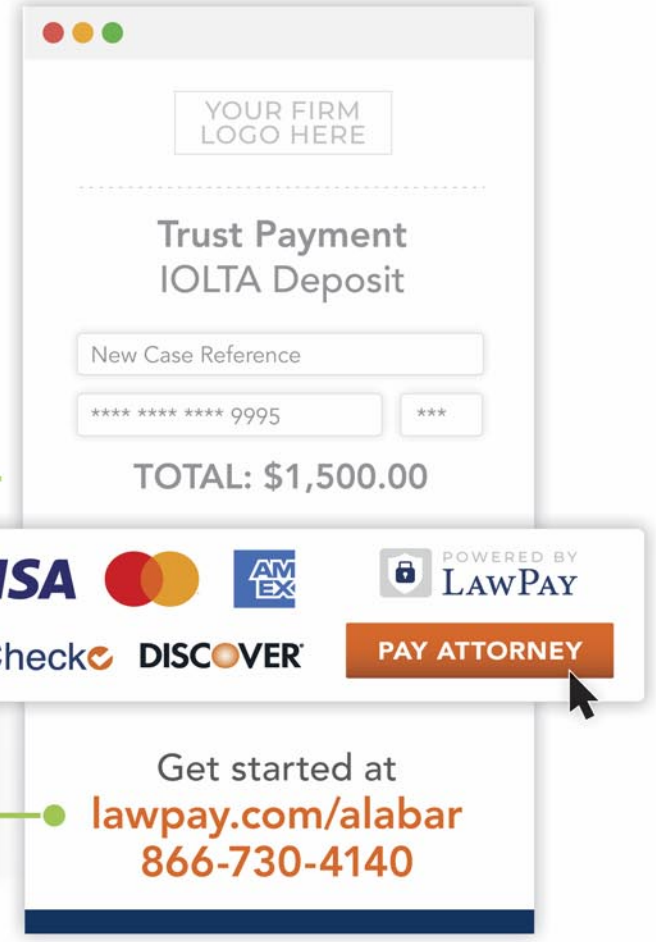

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FLORIDA BAR ETHICS OPINION
OPINION 24-1
January 19, 2024

Advisory ethics opinions are not binding.

Lawyers may use generative artificial intelligence ("AI") in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers must ensure that the confidentiality of client information is protected when using generative AI by researching the program's policies on data retention, data sharing, and self-learning. Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer's ethical obligations. Use of generative AI does not permit a lawyer to engage in improper billing practices such as double-billing. Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.

RPC: 4-1.1; 4-1.1 Comment; 4-1.5(a); 4-1.5(e); 4-1.5(f)(2); 4-1.5(h); 4-1.6; 4-1.6 Comment; 4-1.6(c)(1); 4-1.6(e); 4-1.18 Comment; 4-3.1; 4-3.3; 4-4.1; 4-4.4(b); Subchapter 4-7; 4-7.13; 4-7.13(b)(3); 4-7.13(b)(5); 4-5.3(a)

OPINIONS: 76-33 & 76-38, Consolidated; 88-6; 06-2; 07-2; 10-2; 12-3; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993); Iowa Ethics Opinion 11-01; New York State Bar Ethics Opinion 842

CASES: *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023); *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992); *The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002); *Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006)

The Florida Bar Board of Governors has directed the Board Review Committee on Professional Ethics to issue an opinion regarding lawyers' use of generative artificial intelligence ("AI"). The release of ChatGPT-3 in November 2022 prompted wide-ranging debates regarding lawyers' use of generative AI in the practice of law. While it is impossible to determine the impact generative AI will have on the legal profession, this opinion is intended to provide guidance to Florida Bar members regarding some of the ethical implications of these new programs.

Generative AI are "deep-learning models" that compile data "to generate statistically probable outputs when prompted." IBM, What is generative AI?, (April 20, 2023), https://research.ibm.com/blog/what-is-generative-AI (last visited 11/09/2023). Generative AI can create original images, analyze documents, and draft briefs based on written prompts. Often, these programs rely on large language models. The datasets utilized by generative AI large language models can include billions of parameters making it virtually impossible to determine

how a program came to a specific result. Tsedel Neeley, 8 Questions About Using AI Responsibly, Answered, Harv. Bus. Rev. (May 9, 2023).

While generative AI may have the potential to dramatically improve the efficiency of a lawyer's practice, it can also pose a variety of ethical concerns. Among other pitfalls, lawyers are quickly learning that generative AI can "hallucinate" or create "inaccurate answers that sound convincing." Matt Reynolds, vLex releases new generative AI legal assistant, A.B.A. J. (Oct. 17, 2023), https://www.abajournal.com/web/article/vlex-releases-new-generative-ai-legal-assistant (last visited 11/09/2023). In one particular incident, a federal judge sanctioned two unwary lawyers and their law firm following their use of false citations created by generative AI. *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023).

Even so, the judge's opinion explicitly acknowledges that "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance." Id. at 1.

Due to these concerns, lawyers using generative AI must take reasonable precautions to protect the confidentiality of client information, develop policies for the reasonable oversight of generative AI use, ensure fees and costs are reasonable, and comply with applicable ethics and advertising regulations.

Confidentiality

When using generative AI, a lawyer must protect the confidentiality of the client's information as required by Rule 4-1.6 of the Rules Regulating The Florida Bar. The ethical duty of confidentiality is broad in its scope and applies to all information learned during a client's representation, regardless of its source. Rule 4-1.6, Comment. Absent the client's informed consent or an exception permitting disclosure, a lawyer may not reveal the information. In practice, the most common exception is found in subdivision (c)(1), which permits disclosure to the extent reasonably necessary to "serve the client's interest unless it is information the client specifically requires not to be disclosed[.]" Rule 4-1.6(c)(1). Nonetheless, it is recommended that a lawyer obtain the affected client's informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information.

Rule 4-1.6(e) also requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the client's representation." Further, a lawyer's duty of competence requires "an understanding of the benefits and risks associated with the use of technology[.]" Rule 4-1.1, Comment.

When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations. For generative AI, this specifically includes knowledge of whether the program is "self-learning." A generative AI that is "self-learning" continues to develop its responses as it receives additional inputs and adds those inputs to its existing parameters. Neeley, supra n. 2. Use of a "self-learning" generative AI raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties.

Existing ethics opinions relating to cloud computing, electronic storage disposal, remote paralegal services, and metadata have addressed the duties of confidentiality and competence to prior technological innovations and are particularly instructive. In its discussion of cloud computing resources, Florida Ethics Opinion 12-3 cites to New York State Bar Ethics Opinion 842 and Iowa Ethics Opinion 11-01 to conclude that a lawyer should:

- Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;
- Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and
- Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information.

While the opinions were developed to address cloud computing, these recommendations are equally applicable to a lawyer's use of third-party generative AI when dealing with confidential information.

Florida Ethics Opinion 10-2 discusses the maintenance and disposition of electronic devices that contain storage media and provides that a lawyer's duties extend from the lawyer's initial receipt of the device through the device's disposition, "including after it leaves the control of the lawyer." Opinion 10-2 goes on to reference a lawyer's duty of supervision and to express that this duty "extends not only to the lawyer's own employees but over entities outside the lawyer's firm with whom the lawyer contracts[.]" Id.

Florida Ethics Opinion 07-2 notes that a lawyer should only allow an overseas paralegal provider access to "information necessary to complete the work for the particular client" and "should provide no access to information about other clients of the firm." Additionally, while "[t]he requirement for informed consent from a client should be generally commensurate with the degree of risk involved[,]" including "whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services." Id. Again, this guidance seems equally applicable to a lawyer's use of generative AI.

Finally, Florida Ethics Opinion 06-2 provides that a lawyer should take reasonable steps to safeguard the confidentiality of electronic communications, including the metadata attached to those communications, and that the recipient should not attempt to obtain metadata information that they know or reasonably should know is not intended for the recipient. In the event that the recipient inadvertently receives metadata information, the recipient must "promptly notify the sender," as is required by Rule 4-4.4(b). Similarly, a lawyer using generative AI should take reasonable precautions to avoid the inadvertent disclosure of confidential information and should not attempt to access information previously provided to the generative AI by other lawyers.

It should be noted that confidentiality concerns may be mitigated by use of an inhouse generative AI rather than an outside generative AI where the data is hosted and stored by a third-party. If the use of a generative AI program does not involve the disclosure of confidential

information to a third-party, a lawyer is not required to obtain a client's informed consent pursuant to Rule 4-1.6.

Oversight of Generative AI

While Rule 4-5.3(a) defines a nonlawyer assistant as a "a person," many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer's use of generative AI.

First, just as a lawyer must make reasonable efforts to ensure that a law firm has policies to reasonably assure that the conduct of a nonlawyer assistant is compatible with the lawyer's own professional obligations, a lawyer must do the same for generative AI. Lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants.

Second, a lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.

Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence (Rule 4-1.1), avoidance of frivolous claims and contentions (Rule 4-3.1), candor to the tribunal (Rule 4-3.3), and truthfulness to others (Rule 4-4.1), in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

Third, these duties apply to nonlawyers "both within and outside of the law firm." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); see Fla. Ethics Op. 07-2. The fact that a generative AI is managed and operated by a third-party does not obviate the need to ensure that its actions are consistent with the lawyer's own professional and ethical obligations.

Further, a lawyer should carefully consider what functions may ethically be delegated to generative AI. Existing ethics opinions have identified tasks that a lawyer may or may not delegate to nonlawyer assistants and are instructive. First and foremost, a lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation.

Florida Ethics Opinion 88-6 notes that, while nonlawyers may conduct the initial interview with a prospective client, they must:

- Clearly identify their nonlawyer status to the prospective client;
- Limit questions to the purpose of obtaining factual information from the prospective client; and
- Not offer any legal advice concerning the prospective client's matter or the representation agreement and refer any legal questions back to the lawyer.

This guidance is especially useful as law firms increasingly utilize website chatbots for client intake. While generative AI may make these interactions seem more personable, it presents additional risks, including that a prospective client relationship or even a lawyer-client relationship has been created without the lawyer's knowledge.

The Comment to Rule 4-1.18 (Duties to Prospective Client) explains what constitutes a consultation:

> A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

Similarly, the existence of a lawyer-client relationship traditionally depends on the subjective reasonable belief of the client regardless of the lawyer's intent. *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992).

For these reasons, a lawyer should be wary of utilizing an overly welcoming generative AI chatbot that may provide legal advice, fail to immediately identify itself as a chatbot, or fail to include clear and reasonably understandable disclaimers limiting the lawyer's obligations.

Just as with nonlawyer staff, a lawyer should not instruct or encourage a client to rely solely on the "work product" of generative AI, such as due diligence reports, without the lawyer's own personal review of that work product.

Legal Fees and Costs

Rule 4-1.5(a) prohibits lawyers from charging, collecting, or agreeing to fees or costs that are illegal or clearly excessive while subdivision (b) provides a list of factors to consider when determining whether a fee or cost is reasonable. A lawyer must communicate the basis for fees and costs to a client and it is preferable that the lawyer do so in writing. Rule 4-1.5(e). Contingent fees and fees that are nonrefundable in any part must be explained in writing. Rule 4-1.5(e); Rule 4-1.5(f)(2).

Regarding costs, a lawyer may only ethically charge a client for the actual costs incurred on the individual client's behalf and must not duplicate charges that are already accounted for in

the lawyer's overhead. *See, The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002) (lawyer sanctioned for violations including a $500.00 flat administrative charge to each client's file); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (lawyer should only charge clients for costs that reasonably reflect the lawyer's actual costs); Rule 4-1.5(h) (lawyers accepting payment via a credit plan may only charge the actual cost imposed on the transaction by the credit plan).

Regarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer's billable hours. Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.

While a lawyer may separately itemize activities like paralegal research performed by nonlawyer personnel, the lawyer should not do so if those charges are already accounted for in the lawyer's overhead. Fla. Ethics Op. 76-33 & 76-38, Consolidated. In the alternative, the lawyer may need to consider crediting the nonlawyer time against the lawyer's own fees. Id. Florida Ethics Opinion 07-2 discusses the outsourcing of paralegal services in contingent fee matters and explains:

> The law firm may charge a client the actual cost of the overseas provider [of paralegal services], unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third-party provider.

Additionally, a lawyer should have sufficient general knowledge to be capable of providing competent representation. *See, e.g., Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006). "While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client." Id. at 5.

In the context of generative AI, these standards require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI. In all instances, the lawyer must ensure that the charges are reasonable and are not duplicative. If a lawyer is unable to determine the actual cost associated with a particular client's matter, the lawyer may not ethically prorate the periodic charges of the generative AI and instead should account for those charges as overhead. Finally, while a lawyer may charge a client for the reasonable time spent for case-specific research and drafting when using generative AI, the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI.

Lawyer Advertising

The advertising rules in Subchapter 4-7 of the Rules Regulating The Florida Bar include prohibitions on misleading content and unduly manipulative or intrusive advertisements.

Rule 4-7.13 prohibits a lawyer from engaging in advertising that is deceptive or inherently misleading. More specifically, subdivision (b) includes prohibitions on:

> (3) comparisons of lawyers or statements, words, or phrases that characterize a lawyer's or law firm's skills, experience, reputation, or record, unless the characterization is objectively verifiable; [and]
>
> * * *
>
> (5) [use of] a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm unless the advertisement contains a clear and conspicuous disclaimer that the person is not an employee or member of the law firm[.]

As noted above, a lawyer should be careful when using generative AI chatbot for advertising and intake purposes as the lawyer will be ultimately responsible in the event the chatbot provides misleading information to prospective clients or communicates in a manner that is inappropriately intrusive or coercive. To avoid confusion or deception, a lawyer must inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee. Additionally, while many visitors to a lawyer's website voluntarily seek information regarding the lawyer's services, a lawyer should consider including screening questions that limit the chatbot's communications if a person is already represented by another lawyer.

Lawyers may advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable. Whether a particular claim is capable of objective verification is a factual question that must be made on a case-by-case basis.

Conclusion

In sum, a lawyer may ethically utilize generative AI technologies but only to the extent that the lawyer can reasonably guarantee compliance with the lawyer's ethical obligations. These obligations include the duties of confidentiality, avoidance of frivolous claims and contentions, candor to the tribunal, truthfulness in statements to others, avoidance of clearly excessive fees and costs, and compliance with restrictions on advertising for legal services. Lawyers should be cognizant that generative AI is still in its infancy and that these ethical concerns should not be treated as an exhaustive list. Rather, lawyers should continue to develop competency in their use of new technologies and the risks and benefits inherent in those technologies.

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-457

Issued: March 15, 2024

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at http://www.kybar.org/237), before relying on this opinion.

Subject: **The Ethical Use of Artificial Intelligence ("AI") in the Practice of Law**

Question #1: **Like other technological advances, does an attorney have an ethical duty to keep abreast of the use of AI in the practice of law?**

Answer: **Yes.**

Question #2: **Does an attorney have an ethical duty to disclose to the client that AI is being used with respect to legal matters entrusted to the attorney by the client?**

Answer: **No, there is no ethical duty to disclose the rote use of AI generated research for a client's matter unless the work is being outsourced to a third party; the client is being charged for the cost of AI; and/or the disclosure of AI generated research is required by Court Rules.**

Question #3: **If the effect of an attorney's use of AI reduces the amount of attorney's time and effort in responding to a client matter must the lawyer consider reducing the amount of attorney's fees being charged the client when appropriate under the circumstances?**

Answer: **Yes.**

Question #4: **May an attorney charge the client for expenses related to using AI in the legal practice?**

Answer: **If the client agrees in advance to reimburse the attorney for the attorney's expense in using AI, and that agreement is confirmed in writing, then yes, the attorney may charge for those expenses. However, similar to the lawyer's cost of general overhead expenses, the costs of AI training and keeping abreast of AI developments should not be charged to clients.**

Question #5: **If an attorney utilizes AI in the practice of law, is the attorney under a continuing duty to safeguard confidential client information?**

Answer: **Yes.**

Question #6: **Does an attorney using AI have an ethical duty to review court rules and procedures as they relate to the use of AI, and to review all submissions to the Court that utilized Generative AI to confirm the accuracy of the content of those filings?**

Answer: **Yes.**

Question #7: **Does an attorney serving as a partner or manager of the law firm that uses AI, and/or supervising lawyers and/or nonlawyers in the law firm who are using AI, have an ethical responsibility of ensuring that policies and procedures regarding AI are in place, and that training has taken place to assure compliance with those policies?**

Answer: **Yes.**

REFERENCES

SCR 3.130 [Kentucky Rules of Professional Conduct] 3.130(1.1) & cmt. (2) & (6); (1.4); (1.5(a) & (b)); (1.6); (1.8); (1.9(c)(l)); (3.1); (3.3); (4.1); (5.1(b); (5.8); and (8.4).

Cases:

In re Burghoff, 374 B.R. 681 (Bankr. S.D. Iowa 2007) 374 B.R. 681; *Mata vs. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263, 2023 WL 4114965 (S.D.N.Y. June 22,2023).

Ethics Opinions

KBA E-446 (2018); KBA E-403 (1998); KBA E-427 (2007); KBA E-437 (2007); and KBA E-442 (2017); ABA Formal Ethics Op. 08-451 (2008); ABA Formal Opinion 93-370 (1993); N.C. Ethics Op. 2007-12 (2008); Ohio Ethics Op. 2009-6 (2009); Va. Ethics Op. 1850 (2010); Florida Bar Ethics Opinion 24-1 (2024).

Miscellaneous

2023 Year-End Report of the Federal Judiciary" by John G. Roberts, Jr., Chief Justice of the U.S. Supreme Court; American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2013; President Joe Biden's Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence dated October 22, 2023.

INTRODUCTION

Artificial intelligence ("AI") is defined as "... the use... of computer systems or machines that have some of the qualities that the human brain has, such as the ability to interpret and produce language in a way that seems human, recognize or create images, solve problems, and learn from data supplied to them...."[1] AI is now the latest form of technology that may revolutionize the practice of law. Whether AI is utilized by machine learning such as Google search, by deep learning with voice recognition systems named Siri or Alexa, or Generative AI[2] ("GAI") in applications known as Chat GPT, Google Bard or Microsoft Bing, the potential use of AI in the

[1] Cambridge English Dictionary at "artificial intelligence."

[2] The term "generative" has been found to have two neural networks, a generator, and a discriminator, which are trained simultaneously through a competitive process. The generator creates new data, while the discriminator evaluates whether the generated data is authentic or not. This adversarial training process helps the generator improve over time, creating more realistic and convincing content. However, potential misuse comes into play because generative AI can be used to create deepfakes or other deceptive content.

practice of law is unlimited.[3]

As with all technological advances, attorneys are challenged to meet lawyer ethical responsibilities when utilizing a new product and this applies to AI. Whether the attorney is researching relevant case law, reviewing documents, or drafting court pleadings, care must be taken that the attorney understands how AI works, how it may be used responsibly and in conjunction with the Supreme Court Rules of Professional Conduct.[4] As U. S. Supreme Court Chief Justice John G. Roberts, Jr., explained, "(A)ny use of AI requires caution and humility."[5]

The current Rules of Professional Conduct do not specifically address AI, but they do require an attorney to "...keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology."[6] While the use of AI continues to evolve, some of the suggested benefits of AI for lawyers are:

- Streamlining legal research to find relevant case law, statutes, and precedents more quickly;
- Reviewing and analyzing large volumes of documents and summarizing them;
- Automating repetitive tasks to reduce the requirement for extensive manual labor;
- Detecting deception in emails or documents;
- Predicting case outcomes and legal trends based upon historical data;
- Expediting responses to client inquiries;
- Providing around-the-clock access to legal information and resources;
- Reducing legal expenses to the client due to accelerated research and document preparation.

Although the use of AI in the practice of law is relatively new, certain risks have already become apparent, including but not limited to:

- AI may struggle to grasp complex legal concepts which can produce inaccuracies and misinterpretations;
- AI models trained on biased data may perpetuate biases in the legal decision-making process;
- AI lacks transparency because of its use of AI algorithms which operate as "black boxes" making it difficult to understand how AI arrived at its conclusions;.

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[3] When ChatGPT was asked to explain how it functions and compares to other AI providers, ChatGPT answered, in general, as follows:
ChatGPT is based on Generative Pre-trained Transformer architecture and is trained using a diverse range of internet text but does not have specific knowledge about the details of individual documents or sources. Other AI providers use different architectures, training datasets, and methods. For example, Google's BERT (Bidirectional Encoder Representations from Transformers) focuses on bidirectional context understanding. Further, ChatGPT is designed for natural language understanding, making it suitable for conversational applications, and content generation. Other AI providers may offer a broader range of services, including image recognition, speech processing, and domain-specific applications. Finally, ChatGPT advises that it has options for users to fine-tune models for specific tasks, while other providers may offer more customization options, allowing developers to fine-tune models for specific use cases.

[4] SCR 3.130 et seq.

[5] "2023 Year-End Report of the Federal Judiciary" by John G. Roberts, Jr., Chief Justice

[6] SCR 3.130(1.1), Comment (6).

- AI's generative training may result in the disclosure of confidential client information ;
- AI may provide false information including citations to nonexistent legal "authorities;" and,
- AI may provide duplicative and/or irrelevant materials which may increase discovery production expenses.

The Ethics Committee has issued Ethics Opinions discussing the ever-changing environment of technology and its application to the Rules, and many of these Opinions are applicable to AI.[7] In addition to the guidance provided by these Opinions, we caution lawyers that before using an AI product they review the provider's privacy policies and its disclaimers in handling client and attorney information.

Due to the many concerns surrounding the impact AI has to the ethical requirements of lawyers, the Kentucky Bar Association formed a Task Force on Artificial Intelligence and the Task Force is considering a lawyer's responsible use of AI. Until the Task Force's work is completed, and years of usage have passed, lawyers should be mindful that it may be difficult or impossible to answer many questions regarding the ethical use of AI. Further, we do not address Kentucky's Advertising Rules which may come into play if a lawyer intends to advertise the use of AI because the Advertising Rules raise issues beyond the scope of this Committee's authority.

In the interim it is intended that this Opinion will provide some practical guidance while the Task Force explores multiple AI issues and whether amendments to the Rules of Professional Conduct are appropriate to address the unique applications a lawyer faces in the use of AI. The following commentary is a review of what we today consider the most crucial ethical issues when using an AI tool; however, lawyers must be mindful to the future implications of using AI services and the Rules governing lawyer conduct.[8]

COMPETENCE

SCR 3.130(1.1) mandates 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." Two of the Supreme Court's Comments to the Rules elaborate on the scope of the competency requirement. The first point is Comment 2, as follows:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. ... Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation

[7] *See*, KBA E-446; KBA E-403; KBA E-427; KBA E-437; and KBA E-442. For example, in E-437 the Committee considered a new development in technology (cloud computing) and while the Opinion is not directly applicable to the use of AI, many of the Committee's comments would apply when a lawyer uses AI. The Committee opined that lawyers may use cloud computing but must follow the Rules with regard to safeguarding client confidential information, act competently in using cloud computing, properly supervise the provider of the cloud service, and communicate with the client about cloud computing.

[8] We remind lawyers that the ethical implications of using AI also apply to all of a lawyer's non-lawyer activities; specifically, "a lawyer is a lawyer is a lawyer" and the Rules of Professional Conduct apply to all of a lawyer's actions. SCR 3.130(5.8) ("Responsibilities regarding law-related services").

can also be provided through the association of a lawyer of established competence in the field in question.

The second point is Comment 6, as follows:

> 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.

Therefore, attorneys have a continuing ethical responsibility to maintain competence in their law practice, and reliance upon technology to do so is just another aspect of the competency requirement.

Indeed, for many years lawyers have used technology to not only attain competency in the practice of law, but also to maintain their competence by utilizing computer research resources, including Westlaw, LexisNexis, and Decisis, all of which are readily available. Internet research also provides an additional level of resources for an attorney to best serve their clients' needs. In addition, many lawyers are now required to take training in, and become competent in, the use of electronic filing in state and federal courts, as well as in most administrative proceedings.

Attorneys have already been using AI whether they realize it or not. "Spell check," "grammar search" and the auto correcting function on most emails employ AI, as do the Shephardizing functions of legal research tools. We are told that these functionalities only scratch the surface of what AI may be able to do for the practice of law in this ever-changing dynamic of the technological revolution. As with any new advance in technology, lawyers are expected to know how to use AI to maintain competence because, it is argued, it will allow lawyers to provide better, faster, and more efficient legal services, and at a reduced cost to the client. In the near future, using AI may become as commonplace as an attorney's current use of other technological systems which have now become an indispensable part of the practice of law.

There are many AI resources now available to the lawyer, and there is much discussion about what AI resources are on the horizon, therefore, as AI tools become more refined, and their use in the legal profession becomes more widespread, lawyers need to be aware that not using an available AI tool may constitute a failure to meet the lawyer's duty of attaining and maintaining competence under Rule 1.1. For example, legal research may be more comprehensive using an AI-generated function of computer research programs. At the same time, understanding how AI works, (a) may enable an attorney to better respond to an opponent's arguments or theories, or (b) better analyze the evidence presented by the attorney's adversary. In essence, the rapid development of AI poses challenges for attorneys to continuously update their knowledge base in order to maintain their competence.

COMMUNICATION

Consideration should be given to whether a lawyer has an ethical duty to advise the client that AI is being utilized in respect to their matters. SCR 3.130(1.4)[9] requires that a lawyer keep the

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[9] (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

client reasonably informed about the status of their matter, to promptly inform the client of any decision or circumstance which requires the client's informed consent, and to obtain the client's informed consent of such decision or circumstance. Further, the attorney is required to "reasonably consult" with the client about the means by which the client's objectives are to be accomplished.[10] The word "reasonably" is intended to preclude an interpretation that the lawyer would always be required to consult with the client when a particular act is impliedly authorized.[11] The Rule's Comments explain that the lawyer is to provide the client with sufficient information to participate intelligently in decisions concerning the means by which the client's objectives are to be pursued.[12] Thus, routine use of AI generated research in a client's matter does not in and of itself require specific communication to the client, unless the client is being charged for the cost of the research,[13] a third party service is being utilized to provide the AI research, or if the disclosure of the use of AI generated research is required by Court or other rules.[14]

Moreover, it is clear from prior opinions that when an attorney employs third party providers, or outsources a client's work, that communication of the "means" by which a representation is to be accomplished requires that clients should be informed of such outsourcing.[15] If an outside AI service will be receiving information protected by the lawyer's duty of confidentiality under SCR 3.130(1.6), then obtaining client consent is required. Further, as discussed below, the attorney should also have an agreement with the client about who is responsible for paying the cost of such outsourced services.

LAWYER'S CHARGES FOR FEES & EXPENSES

As with other uses of technology, the lawyer's charging of fees and expenses to a client remains subject to the reasonableness standards of SCR 3.130(1.5(a) and (b)).[16] These standards

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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.

[10] *See* SCR 3.130(1.4(a)(2)).

[11] *See* American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982– 2013, at 77 (2013).

[12] SCR 3.130(1.4) Supreme Court Commentary at (3) and (4).

[13] *See* the portion of this opinion regarding "Lawyers' Charges for Fees & Expenses."

[14] *See* the portion of this opinion regarding "Duty to Comply with Court Rules When Using AI."

[15] *See* ABA Formal Ethics Op. 08-451 (2008); N.C. Ethics Op. 2007-12 (2008); Ohio Ethics Op. 2009-6 (2009); Va. Ethics Op. 1850 (2010).

[16] (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;

(2) the likelihood 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;

provide the following two primary points in charging a client when the lawyer has used AI. First, a reduced fee may be appropriate when a lawyer obtains an expeditious on point response to the client's matter because in all cases a lawyer's fee must be reasonable. Accordingly, the attorney's charge for legal services must be adjusted to recognize the reduced legal work devoted to a client's matter when there is a successful result by virtue of using AI. Second, if there are expenses associated with the use of AI, then who will bear the cost of implementing AI services, such as paying for online usage, and/or reimbursing a third-party provider? If the client is to bear these expenses, then before the charge can be made, the client's written consent must first be obtained.

Regarding the attorney's billings for client services and expenses, the essence of Rule 1.5 and the Supreme Court's Comments to the Rule, require that a lawyer provide the client with information about the lawyer's fees and expenses, and then render billing statements that adequately apprise the client as to the basis for the attorney's billing and how it has been determined. Advanced discussion with the client as to how AI expenses are to be paid are as necessary as the agreement with the client as to the basis or rate of the lawyer's fees. Ethics rules suggest that a written statement that confirms the terms of the engagement with the client "... reduces the possibility of misunderstanding."[17] If the lawyer intends to charge the client for AI expenses and the client agrees to pay these expenses, then the lawyer should explain, in writing and in advance, the anticipated cost of those expenses, the basis for the cost being billed, and the terms of payment.[18] There is an exception when the lawyer has regularly represented the client on an already existing basis, but with any changes in the billing procedure being communicated to the client.[19]

With regards to the time savings that an attorney using AI services may generate, an earlier ABA Formal Opinion[20] provided guidance which the attorney will continue to find helpful in determining the propriety of the lawyer's billing methods. The ABA Opinion explains that a lawyer is obliged to pass the benefits of economies on to the client. Thus, the use of AI programs may make a lawyer's work more efficient, and this increase in efficiency must not result in falsely

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(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.

[17] *See* Comment (2) When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. It is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate, or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[18] *See*, SCR 3.130(1.5), Comments 2 and 3.

[19] *See*, SCR 3.130(1.5(a)&(b)).

[20] ABA Formal Opinion 93-370 (December 6, 1993).

inflated claims of time.

It should be obvious that lawyers may not charge a client for hours not actually spent on a client's matter. In the case of *In re Burghoff*,[21] the court found that the attorney's brief contained an extraordinary amount of research, and the attorney was directed to certify to the Court the author of two submitted briefs. The Court found that 17 of the 19 pages of one brief were verbatim excerpts from an article the lawyer found on the internet which had not been attributed to the article's author. The Court held, first, that it was a violation of the ethics Rules for an attorney to "...engage in conduct involving dishonesty, fraud, deceit, or misrepresentation ... by committing plagiarism, ...".[22] Further, the Court found that the attorney violated the ethics Rules by charging his client for 25.5 hours of legal work in preparing the briefs which was unreasonable given the actual labor invested in copying the article from the internet. Charging an unreasonable fee for "legal work" was also considered a form of attorney misconduct.[23]

While the total impact and costs for AI remain unknown, lawyers must consider the ethical requirements of SCR 3.130(1.5); specifically, including the following:

- Costs incurred in learning about AI, in maintaining AI provided services, and keeping up to date with changes in its use, should be considered like any other continuing legal education expense, and a part of the lawyer's overhead.
- Lawyers charging their clients on an hourly basis cannot submit inflated bills for hours not actually spent on their case, and savings generated by using AI, like other technologies, should be passed on to the client.
- Lawyers may request that their client reimburse them for the costs incurred in using AI services, but only after first explaining the anticipated cost, and also obtaining the client's agreement to reimburse the attorney for the expense.

CONFIDENTIALITY OF CLIENT INFORMATION

There is no ethical duty more sacrosanct than the requirement that an attorney not reveal information relating to a client, or the fact of the attorney's representation of that client, without the client's informed consent. SCR 3.130(1.6) is clear: "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 ..." under a specific exception to the Rule.[24] Additional Rules extend this nondisclosure duty to information provided to an attorney by a prospective client,[25] as well as to information obtained by the attorney in the representation of a former client.[26] The nondisclosure duty is broad, inasmuch as "(t)he confidentiality rule, for example, applies not only to matters communicated in confidence by the

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[21] 374 B.R. 681 (Bankr. S.D. Iowa 2007) 374 B.R. 681.
[22] *Ibid*, at page 683.
[23] Id.
[24] Paragraph (b) to SCR 3.130(1.6) creates exceptions to the disclosure prohibition in those circumstances where the "... lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to secure legal advice about a lawyer's compliance with these Rules..." or (3) to establish a claim or defense on behalf of a lawyer and the client, or in defense of a criminal or civil charge made by the client against the lawyer, or "(4) to comply with another law or a court order."
[25] *See*, SCR 3.130(1.8).
[26] *See*, SCR 3.130(1.8(b)) and (1.9(c)(1)).

client, but also to all information relating to the representation, whatever its source."[27]

It is well known that "AI is making it easier to extract, re-identify, link, infer, and act on sensitive information about people's identities, locations, habits, and desires. AI's capabilities in these areas can increase the risk that a client's personal data could be exploited and exposed."[28] To prevent or reduce this risk of disclosure, the attorney must ensure that the use and the retention of confidential client information by an AI provider is secure and avoids confidentiality risks. In order to confirm the confidentiality of client information, the attorney should understand how generative AI products are being used and then not input any client information that lacks reasonable and adequate security protections unless, of course, client consent is first obtained. Some generative AI products utilize inputted information or uploaded documents such as pleadings or contracts to train itself, or to share that information with third parties. Therefore, the attorney should review the "terms of use" of any AI product and the provider's disclaimers in order to understand whether the AI provider shares inputted information with a third party or will utilize the lawyer's inputted information for its own purposes.

Hence, an attorney should take care that any information inputted into a generative AI product does not identify the client or the nature of the representation. Historically, attorneys have relied upon hypotheticals to discuss legal or factual issues relating to a client's representation; however, the use of hypotheticals is only permissible as long as there is no reasonable likelihood that anyone will be able to determine who the client is or what the client matter involves.[29] The sophistication of generative AI which allows the attorney to have near-human conversations by asking questions with AI responding calls into question whether the use of a hypothetical can be disguised sufficiently to avoid confidential client information from being disclosed.

There are GAI systems that promise that the provider will not send a client's information off-site, or host or share third party content. If that promise is confirmed in writing, then it may be allowable to input the client's confidential information with that provider. However, it still may be difficult, or even impossible to determine whether client information has been kept confidential and once the information has been disclosed it has not yet been judicially determined whether sharing information with an AI program would render that information discoverable, and/or result in waiving claims of attorney-client privilege. Because these questions are currently unanswered, lawyers are advised to maintain a healthy dose of skepticism of AI programs and should proceed with caution.[30]

Two final points on this issue: first, if the attorney intends to utilize AI and is concerned that despite taking appropriate preventative measures confidential client information will be inadvertently disclosed, then SCR 3.130(1.6) allows disclosure of client information if the client gives "informed consent."[31] The attorney should discuss with the client the proposed use of AI, the applications of AI to be utilized, the risks and benefits of the AI product, and fully explain

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[27] *See*, SCR 3.130(1.6), Comment (3).

[28] President Joe Biden's Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence dated October 22, 2023.

[29] *See*, SCR 3.130(1.6), Comment (5).

[30] The words of President Reagan: "trust but verify" come to mind – this is what we need to do.

[31] See, SCR 3.130(1(e)) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

privacy concerns. With the informed consent of the client, the attorney should be able to meet this Rule's ethical obligations. We recognize there are some states that are considering ethics rules requiring clients to give advance permission before an attorney may use AI on their legal matters, but at this time Kentucky does not have any similar pending rules.

Second, using AI may expose a host of cybersecurity threats to the law firm, including phishing, social engineering, and malware. "We use ChatGPT differently than the way we use other types of searches, and therefore any vulnerabilities in ChatGPT become exacerbated and are much more likely to lead to the exposure of privileged information."[32]

DUTY TO COMPLY WITH COURT RULES WHEN USING AI

"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; (or) (2) fail to disclose to the tribunal published 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.."[33] Accordingly, attorneys have an ethical duty to ensure that legal authorities presented to the Court are accurate. GAI tools are known to sometimes produce erroneous and often fictitious responses to inquiries that may seem credible, called "hallucinations." Attorneys who use AI provider services like ChatGPT have a responsibility to check their pleadings for accuracy in their references to both facts and legal citations. Citing non-existent judicial opinions, false quotes and fake citations in filings with the court have caused the judiciary to take notice, and in some instances the attorneys have been sanctioned for their inaccuracy and misleading pleadings. Two New York lawyers were recently sanctioned after the Court found they filed a brief that contained numerous fake, GAI case law citations, when they later failed to "come clean" with the Court about their use.[34] Since then several federal and specialty courts, and at least one state court, have adopted rules requiring attorneys using AI programs to review, and verify any computer-generated content, and then certify that fact to the courts with their filings.[35]

In light of the everchanging nature of AI and the adoption of different court practice rules,[36] attorneys are reminded that they are responsible to understand the court rules and procedures to competently represent a client in those courts in which they are practicing, including those rules related to AI.[37] The attorney should check, and keep abreast of any rules, orders or other court procedures implemented in the jurisdiction in which the attorney is practicing that may require additional certifications as it relates to filings prepared by utilizing GAI products.

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[32] Mark D. Rasch, lawyer, cybersecurity, and data privacy expert, quoted in "What cybersecurity threats do generative AI chatbots like ChatGPT pose to lawyers?," American Bar Association Journal (June, 2023).
[33] SCR 3.130(3.3(a)).
[34] *Mata vs. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263, 2023 WL 4114965 (S.D.N.Y. June 22,2023).
[35] U.S. District Court for the Eastern District of Texas. U.S. District Judge Brantley Starr of the Northern District of Texas is one of the first U.S. Judges to require lawyers to certify that they did not use AI to draft their filings without a human checking their accuracy. In addition, the United States Court of Appeals for the Fifth Circuit has pending a similar certification requirement, and notes that lawyers who misrepresent their compliance with this certification could be sanctioned and have their filings stricken of record.
[36] Utah has established rules concerning the use of GAI and restricts judicial officers and court employees to using ChatGPT(version 3 or 4); Claude.ai(Beta); and Bard (Experiment) for all court-related work.
[37] *See*, SCR 3.130(1.1).

If an attorney later discovers an inaccuracy, then the attorney is required to correct the inaccuracy, and to notify the Court of any misleading statements. Without a doubt, if the Court questions the attorney's filings that include fake cases, the attorney must be candid with the Court and explain the error. Failure to do so not only subjects the attorney to potential sanctions by the Court but may also result in disciplinary action for the attorney for noncompliance with the Rules.[38]

SUPERVISING ATTORNEYS' RESPONSIBILITIES WHEN USING AI

SCR 3.130(5.1) requires a partner in a law firm, as well as an individual lawyer who exercises managerial authority over others, to make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules." Lawyers who have direct supervisory authority over another lawyer are similarly responsible to ensure the other lawyer complies with the Rules.[39] Having policies and procedures relating to the use of AI in the law firm may reduce potential disclosure of confidential client information and ensure that generative AI is being used appropriately. "AI systems keep challenging old conceptions of things like security, privacy, and fairness. But at another level, they just reinforce existing best practices."[40] These issues were discussed in KBA E-446 relating to cybersecurity and confirmed that law firm partners, managers of attorneys, and any attorneys supervising other attorneys are required to ensure that all of the firm's attorneys, as well as nonlawyer assistants, employees, or independent contractors who are under their supervision, comply with the Rules of Professional Conduct. This requirement places an enhanced responsibility upon those managerial attorneys to prescribe policies and procedures to reduce the risk of disclosure of confidential information when using AI, as well as to explain the permissible uses, as well as the known risks of AI.

The following comments of Florida Bar Ethics Opinion 24-1 are appropriate to this topic:

> (A) lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.
>
> Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence [Kentucky SCR 3.130(4.1)], avoidance of frivolous claims and contentions [Kentucky SCR 3.130(3.1)], candor to the tribunal [Kentucky SCR 3.130(3.3)], and truthfulness to others [Kentucky SCR 3.130(4.1)], in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

The Committee does not intend to specify what AI policy an attorney should follow because it is the responsibility of each attorney to best determine how AI will be used within their law firm and then to establish an AI policy that addresses the benefits and risks associated with AI products. The fact is that the speed of change in this area means that any specific recommendation will likely be obsolete from the moment of publication. At the very least lawyers must take care

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[38] See, SCR 3.130(8.4).

[39] *See*, SCR 3.130(5.1(b)).

[40] "What cybersecurity threats do generative AI chatbots like ChatGPT pose to lawyers" by Matt Reynolds, American Bar Association Journal (June, 2023).

to address the use of any form of AI, what risk is associated with it, and what steps can be taken to avoid release of client information. As a part of this process, it is appropriate to review the law firm's existing cybersecurity policies so as to take AI into consideration.

The establishment of policies and procedures to deal with AI is an important step in meeting a lawyer's ethical obligations but it is not the end of the lawyer's duties. "All lawyers must make sure that subordinate attorneys, interns, paralegals, case managers, administrative assistants, and external business partners all understand necessary data and security practices and the critical role that all parties play in ensuring the protection of client information."[41] Creating a culture of security and privacy of client information may be best attained through training everyone on the law firm's AI policies and focusing on human error and behavior. "Humans are ... involved in more than 80% of data breaches, whether they've clicked on a phishing email or they've just done something stupid."[42]

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.

[41] KBA Ethics Opinion E-446, quoting Drew T. Simshaw in the American Journal of Trial Advocacy.
[42] Sharon Nelson, president of Sensei Enterprises, as quoted in ABA Journal, supra at 4.

ETHICS OPINION NUMBER 267
OF THE MISSISSIPPI BAR
RENDERED NOVEMBER 14, 2024

CAVEAT: This opinion is limited strictly to the facts set forth in the hypothetical submitted and is limited to the question of whether the proposed conduct is permissible under the Mississippi Rules of Professional Conduct. The Ethics Committee is prohibited from rendering opinions on questions of law by Article 8-15(c) of the Bylaws of The Mississippi Bar. Any incidental reference to legal authorities is informational only and should not be taken as the Committee's interpretation of such authorities or of the legal issues arising from the hypothetical presented or of the legal ramifications of the proposed conduct. The Committee's opinion is limited to ethical issues only.

The Ethics Committee of the Mississippi Bar has been asked to render an opinion on the following:

Lawyer would like to use AI platforms and services in Lawyer's practice and asks for guidance regarding whether Lawyer may ethically use such platforms, specifically:

1. Does a lawyer have an affirmative duty to take reasonable measures and precautions to protect the confidentiality of client information when using generative AI?
2. Does a lawyer have an affirmative duty to verify the accuracy and sufficiency of all work performed by generative AI?
3. Does a lawyer have an affirmative duty to review costs and fees to ensure that any billing practices do not duplicate charges or inflate billable hours?
4. And finally, does a lawyer have an ethical duty to disclose to the client that AI is being used with respect to legal matters entrusted to the lawyer by the client.

I. Introduction

Lawyers around the world including in Mississippi now make regular use of technology that incorporates Artificial Intelligence (AI) based technologies. AI includes computer technology, software, and systems that perform tasks traditionally requiring human intelligence. More recently, lawyers have started to use a new form of AI – Generative AI (GAI) – in their practice. GAI can create new content, including text, images, audio, video, and software code in response to a user's prompts and questions. GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted from the dataset on which they are trained. Datasets are composed of large amounts of digital text culled from a variety of sources, including proprietary data sources in some cases. Some GAI tools are "self-learning," meaning

that as more data is included in the data set, the GAI will "learn" and evolve. GAI tools may assist lawyers in tasks such as legal research, contract review, document review, regulatory compliance, and drafting letters, contracts, briefs and other legal documents.

AI and GAI tools offer the potential to help lawyers deliver higher quality and more efficient legal services by streamlining processes, analyzing large quantities of information, and drafting legal documents. In particular, AI can streamline legal research, review, analyze, and summarize large volumes of documents, automate repetitive tasks reducing manual labor, detect deception in emails or documents, predict case outcomes and legal trends based upon historical data, expedite responses to client inquiries, and reduce legal expenses to the client due to accelerated research and document preparation.[1]

There are also risks inherent in the use of this new technology. GAI may struggle to grasp complex legal concepts, producing inaccuracies and misinterpretations. GAI may "hallucinate" information when it perceives a pattern that is not actually present, including citations to nonexistent legal "authorities." GAI models trained on biased data may perpetuate biases. GAI algorithms lack transparency making it difficult to understand how the software arrived at its conclusions. And of particular concern to the legal profession, the use of "self-learning" GAI tools risks the disclosure of client confidential information.[2]

This Opinion addresses ethical issues raised by the use of GAI in the practice of law but only those that have been presented to the Committee by formal request. The Committee's analysis is necessarily general because there are a wide range of GAI tools that lawyers may choose to utilize. Further, this new technology is changing rapidly, and its precise features and capabilities are evolving and will continue to change in ways that are difficult to anticipate.

II. A lawyer has an affirmative duty to take reasonable measures and precautions to protect the confidentiality of client information when using generative AI.

Mississippi Rule of Professional Conduct 1.6(a) provides that "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…." Confidential information is broadly defined to include all information relating to the representation. The Comment to Rule 1.6 requires a lawyer

[1] *See* KBA E-457 at 3 (2024).
[2] *Id.* at 4.

to "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."

When lawyers use GAI tools, they must be aware that those tools can place their client's information at risk. Trade secrets are of particular concern, but Rule 1.6 requires lawyers to protect all confidential information. When lawyers input client information into GAI tools, they need to be aware of the risk that their clients' confidential information could be disclosed to those who should not have access to it. For example, some GAI tools use information that users input to train themselves, and those tools could disclose that information to other users in response to their prompts.

Lawyers can mitigate or even eliminate these concerns – and thereby fulfill their "duty to act competently to safeguard" confidential information – in a variety of ways. First, lawyers should review the GAI tool's terms of use (including privacy and data retention policies) to determine whether and how any information is shared with other users. Some GAI tools do not pose a risk to confidentiality. Similarly, lawyers may be able to negotiate terms with providers that ensure that client confidential information is protected.

Second, if possible, lawyers should not input identifiable client information into the GAI tool. *See* Mississippi Rule of Professional Conduct 1.6 Comment ("A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."). Of course, depending on the tool, this might not be possible as the effectiveness of some GAI tools depends on receiving client information.

If a lawyer intends to use a GAI tool and remains concerned that, despite taking reasonable precautions to prevent the disclosure of confidential information, that information is at risk, the lawyer should obtain the client's informed consent. To obtain the client's informed consent, the lawyer must "discuss with the client the proposed use of AI, the applications of AI to be utilized, the risks and benefits of the AI product, and fully explain privacy concerns."[3]

Consistent with Mississippi Rules of Professional Conduct 5.1 and 5.3, lawyers with managerial and supervisory responsibilities must also make efforts to ensure that subordinate lawyers and non-lawyers (whether employed by the firm or third-party

[3] *Id.* at 9-10.

contractors) not reveal and take reasonable measures to protect confidential client information. Accordingly, firms should train their legal and non-legal staff on these issues and consider firm policies addressing these issues.

III. A lawyer has an affirmative duty to verify the accuracy and sufficiency of work performed by generative AI.

Mississippi Rule of Professional Conduct 1.1 requires that a lawyer "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The Comment to Rule 1.1 requires that lawyers "maintain the requisite knowledge and skill" through "continuing study and education." The Committee has previously recognized that keeping up with technology and understanding the benefits and risks of new technology are an important part of the lawyer's duty of competence. *See* Ethics Opinion No. 263 ("lawyers must weigh the benefits of cloud-based storage against the new risks presented by that technology."); Ethics Opinion No. 259 (recognizing that lawyers have an ethical duty to understand how metadata is created). AI technology is changing rapidly, and lawyers need to keep up with those changes in order to competently represent their clients.

Consistent with Mississippi Rules of Professional Conduct 5.1 and 5.3, lawyers with managerial and supervisory responsibilities must also make efforts to ensure that subordinate lawyers and non-lawyers (whether employed by the firm or third-party contractors) are competent with GAI.

As with other aspects of law practice, there are several different paths to achieving competence. Lawyers may achieve the required competence by "engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field….This means that lawyers should either acquire a reasonable understanding of the benefits and risks of GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations."[4]

GAI tools offer significant potential benefits to clients in the form of higher quality and more efficient legal services. At the same time, however, the use of these tools creates risks. Among the most concerning is that GAI tools sometimes create inaccurate output, a concern noted by Chief Justice John Roberts in his 2023 Annual Report on the Judiciary.[5] In several widely reported cases, GAI tools have

[4] ABA Formal Op. 512 at 2-3.

[5] *See* https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

"hallucinated" legal authorities, and lawyers who carelessly relied on the fictional authorities have been sanctioned.

Obviously, then, lawyers cannot indiscriminately or solely rely on GAI tools, but if lawyers must use other methods to repeat all the work performed by the GAI tools, then there is no point in using those tools in the first place. When a lawyer uses a GAI tool to perform a task, he should consider that tool as a "virtual assistant" and treat the work product of that tool similar to how he would treat work product performed by subordinate lawyers or nonlawyers: the lawyer remains fully responsible for the work, and the proper approach is "trust but verify."[6] As part of the lawyer's responsible use of a GAI tool, the lawyer should determine whether there is a reasonable basis for trusting the tool's output. GAI tools perform a wide variety of tasks, and the level of trust and amount of verification depends on the circumstances. We adopt the ABA Ethics Committee's analysis of this issue:

> The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

Moreover, lawyers may not abdicate their responsibilities by relying solely on GAI tools to perform tasks that call for the exercise of professional judgment" such as "offer[ing] legal advice to clients, negotiat[ing] clients' claims or perform[ing] other functions that require a lawyer's personal judgment or participation.[7]

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[6] Several authorities have suggested this approach. *See, e.g.,* https://virginialawyer.vsb.org/articles/trust-but-verif-ai-a-judicious-approach-to-incorporating-ai-in-virginia-s-legal-profession?m=53176&i=826819&view=articleBrowser&article_id=4818807&ver=html5

[7] ABA Formal Op. 512 at 4.

IV. A lawyer has an affirmative duty to review costs and fees to ensure that any billing practices do not duplicate charges or inflate billable hours.

Mississippi Rule of Professional Conduct 1.5(a) requires that all of a lawyer's fees and expenses be "reasonable" and includes a non-exclusive list of criteria for evaluating whether a fee or expense meets that standard. Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses (unless the client is a regularly represented client and the terms are not changing). The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, if a lawyer wants to treat the GAI tool as an expense and charge the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge within a reasonable time of commencing the representation, preferably in writing.

This logic applies if the lawyer uses the GAI tool himself or uses a third-party provider's GAI service. Thus, for example, if the lawyer uses a third-party provider's GAI tool to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool, provided the lawyer communicates this to the client.

If, on the other hand, the lawyer chooses to treat GAI as an overhead expense, that is a different matter. Lawyers may not bill clients for general office overhead expenses, including the routine costs of maintaining a library, securing malpractice insurance, renting office space, and the like. Such overhead should be subsumed within the lawyer's charges for professional services. Accordingly, absent disclosure to the client, a lawyer should consider the cost of GAI tools and services to be overhead that may not be charged to the client.

Lawyers must also consider the impact that the use of GAI tools may have on the time they expend to complete certain tasks. One of the chief benefits of GAI tools is that they may allow lawyers to deliver legal services in a faster and more efficient manner. The benefit of any efficiency achieved must go to the client, not the lawyer. For example, lawyers who bill clients on an hourly basis for time spent on a matter may only bill for their actual time, and not more. Thus, regardless of the efficiencies achieved with GAI tools, the client should only be charged a reasonable fee for the legal services performed which means that the lawyer is only compensated for time actually and reasonably expended.

Further, lawyers should not bill their client for time spent to gain knowledge about GAI tools and services. Costs incurred in learning about GAI, in maintaining GAI-provided services, and keeping up to date with changes in its use, should be considered as a part of the lawyer's overhead, just like any other continuing legal education expense.

Moreover, the lawyer who charges a flat or contingency fee must also ensure the reasonableness of those fees when the lawyer uses a GAI tool. Because the use of a GAI tool may enable the lawyer to complete tasks more quickly than without the tool, it may be unreasonable for the lawyer to charge the same flat or contingency fee when using the GAI tool as when not using it.

The best practice is to memorialize any agreement that the lawyer and the client have regarding billing practices or billing terms relating to GAI tools and services in writing before billing the client.

V. A lawyer has an ethical duty to disclose to the client that AI is being used with respect to legal matters entrusted to the attorney by the client in certain circumstances.

Mississippi Rule of Professional Conduct 1.4 requires that a lawyer keep the client reasonably informed about the status of their matter, to promptly inform the client of any decision or circumstance which requires the client's informed consent, and to obtain the client's informed consent of such decision or circumstance. Further, the attorney is required to "reasonably consult" with the client about the means by which the client's objectives are to be accomplished.

Routine use of a GAI tool in a client's matter does not in and of itself require specific communication to the client, unless the client is being charged for the costs of the GAI tool, there is a risk of disclosing confidential client information, or if the disclosure of the use of the GAI tool is required by court or other rules. However, certain situations will require disclosure in order to comply with Rules 1.5 and 1.6. When a lawyer will be providing confidential client information to a third-party provider, when the lawyer will be passing the expense of the AI tool on to the client, or when the lawyer is concerned that despite taking appropriate preventative measures confidential information may be inadvertently disclosed, then the lawyer must obtain the client's informed consent.

Conclusion

Lawyers in Mississippi may ethically use Generative AI, provided the lawyer has made appropriate safeguards to protect client confidential information, is competent to use the technology, takes precautions to verify the accuracy of the tool's output, uses reasonable billing practices, and obtains the client's informed consent when appropriate.

Informal Opinion Number: 2024-11

Adoption Date: April 25, 2024

Rules: 4-1.1, 4-1.6, 4-3.3, 4-3.4, 4-5.1, 4-5.3, 4-5.4

Client-Lawyer Relationship; Advocate; Law Firm and Associations

Competence; Confidentiality of Information; Candor Toward the Tribunal; Duties to Opposing Party and Counsel and Ethical Obligations to Follow Court Orders and Rules; Responsibilities of Partners, Managers, and Supervisory Lawyers; Responsibilities Regarding Nonlawyer Assistants

Subject: Candor to the Court or Tribunal; Competence; Confidentiality; Supervision of Nonlawyers

Summary: lawyer's use of generative artificial intelligence (AI)

Question: Lawyer would like to use generative artificial intelligence (AI) platforms and services in Lawyer's practice and asks for guidance regarding whether Lawyer may ethically use this emerging technology. What ethical issues should Lawyer consider in developing a policy to use this technology in Lawyer's practice within Law Firm?

Answer: Various forms of artificial intelligence are used by lawyers every day. However, Lawyer rightly has distinguished that generative artificial intelligence, a type of AI wherein the platform being used is learning and further developing from each query or task to generate new content and produce an appropriate response in this context to assist Lawyer, requires an examination of ethical considerations just as any other new technology service or device does that is being considered for implementation into Law Firm's use. In developing a policy to use generative artificial intelligence platforms within Law Firm, this office provides the following initial guidance as an Informal Opinion on the subject of generative artificial intelligence. The Informal Opinion is not intended to be an exclusive list of ethical considerations, as all of the Missouri Rules of Professional Conduct pursuant to Rule should be considered, but it is intended to address key ethical considerations to the question presented. Lawyer should also analyze other legal considerations outside the scope of an informal opinion.

It is important to note that this is not the first time that an Informal Opinion has addressed technology considerations for lawyers. Lawyer may also gain guidance and understanding from reviewing other technology-related Informal Opinions including: 2023-09 (lawyers may not use third-party payment programs where advance paid legal fees or expense are not deposited directly in a client trust account);

2021-13 (metadata); 2020-26 (theft of laptop, cell phone, bar card, and credit cards; loss of client confidential information); 2018-10 (crowdfunding); 2018-09 (cloud computing); and 990007 (email).

First, Lawyer must consider the duty of competence in the appropriateness of use of generative AI. Rule 4-1.1 – Competence, states 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." Comment [6] to Rule 4-1.1 provides guidance that part of that duty of competence by stating that "[t]o 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." [emphasis added.] Lawyer should get education and training to ascertain what types of generative AI are and are not appropriate for use by Law Firm. Not all generative AI platforms and services are intended for use by lawyers, and Lawyer must understand the risks and benefits of implementing use of these technologies.

Second, Lawyer must consider confidentiality. Rule 4-1.6(a) on confidentiality generally prohibits a lawyer from revealing information related to a representation of a client unless an exception is met. That means that Lawyer needs to carefully assess any generative AI platforms or services that will be used by Law Firm to ensure confidentiality of client information is maintained. Lawyer should carefully consider such factors as the terms and conditions of using a generative AI platform or service to understand the security of the information being inputted, how that information is being used by the platform or service, and what data sources the platform or service is using to produce responses to prompts or queries. See Informal Opinion 2018-04 (cloud computing) and Informal Opinion 2021-12 (virtual practice).

Additionally, Rule 4-1.6(c) states that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." Comment [15] to Rule 4-1.6 provides guidance that lawyers are required to act competently to safeguard client confidential information and creates three categories for doing so: (1) unauthorized access by third parties; (2) inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client; and (3) inadvertent or unauthorized disclosure by those subject to the lawyer's supervision. In describing these categories, Comment [15] to Rule 4-1.6 references Rule 4-1.1 (Competence), Rule 4-5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), and Rule 4-5.3 (Responsibilities Regarding Nonlawyer Assistants). Comment [15] to Rule 4-1.6 also provides factors that lawyers should consider as to the reasonableness of efforts to safeguard client confidential information, and it includes a reference that state or federal data privacy laws outside the Rules of Professional Conduct may require additional safeguards over client confidential information or notification in the event of a loss of, or unauthorized access to, such information. In

considering the use of a generative AI platform or service, lawyers are required to make reasonable efforts to safeguard client confidential information in accordance with Rule 4-1.6(c) and Lawyer should consider the guidance of Comment [15] as to how client confidential information will be safeguarded.

Further, Comment [16] to Rule 4-1.6 provides guidance as to reasonable precautions "[w]hen transmitting a communication that includes information relating to the representation of a client…." Lawyer should consider the guidance from Comment [16] to Rule 4-1.6 to the extent use of a generative AI platform or service may include transmission of client confidential information.

Third, to the extent court orders or court rules implicate the use of any generative AI platform or service, Lawyer should be mindful of the obligation pursuant to Rule 4-3.4(c) that prohibits knowingly disobeying an obligation under the rules of a tribunal.

Fourth, Lawyer and Law Firm must protect and maintain professional independence and independent professional judgment as required by Rule 4-5.4 and not rely solely on content created by a generative AI platform or service.

Fifth, if Lawyer or members of Law Firm use content produced with the assistance of a generative AI platform or service, just as any other time a lawyer is being assisted by a nonlawyer, there is a professional responsibility to verify the accuracy and content of the product in accordance with Rule 4-5.3. Professional responsibilities regarding nonlawyers outside the firm, including service providers, are addressed by guidance in Comments [3] and [4] to Rule 4-5.3. See Informal Opinion 2021-12 (virtual practice); Informal Opinion 2021-03 (contract with vendor for disposal of client files); and Informal Opinion 2018-04 (cloud computing). Per Rule 4-5.3(c), if Lawyer has managerial authority or supervisory authority, Lawyer is ethically responsible for conduct that would be a violation of the Rules of Professional Conduct if engaged in by Lawyer if Lawyer orders or with specific knowledge of the conduct ratifies it, or knows of the conduct at a time when its consequences could have been avoided or mitigated, but Lawyer failed to take reasonable remedial measures. See Informal Opinion 2022-07 (email sent to incorrect address); Informal Opinion 2021-12 (virtual practice); and Informal Opinion 2017-02 (lawyer's responsibilities when a nonlawyer assistant breaches confidentiality).

Sixth, in developing this generative AI use policy, Lawyer and Law Firm should also consider supervisory responsibilities in relation to Rule 4-5.1, which requires managers and supervisors to ensure that other lawyers in the firm conform to the Rules of Professional Conduct. Per Rule 4-5.1(c), a lawyer with such responsibility within Law Firm is responsible for the conduct of another lawyer's violation of the Rules of Professional Conduct if the lawyer orders, or with specific knowledge of the conduct ratifies it or otherwise fails to take reasonable remedial action at a time when the lawyer knows of the conduct and consequences can be avoided or mitigated. See Informal Opinion 2021-12 (virtual practice). An ethical

framework for the use of generative AI, if Lawyer and Law Firm decide to use it, should be developed, and, just as with any other resource or tool used in the practice of law, appropriate training should be provided to educate lawyers and nonlawyers. See Rule 4-5.1 and 4-5.3.

Seventh, Lawyer and Law Firm should consider how use of generative AI may impact the reasonableness of fees pursuant to Rule 4-1.5(a).

Finally, use of a product of generative AI can also implicate Rule 4-3.3 – Candor Toward the Tribunal. Rule 4-3.3(a) states that "[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." At this point, generative AI tools are not always accurate, thereby requiring the careful attention to competence and supervision as outlined above to avoid any false statement of material fact or law to a tribunal. See Informal Opinion 2020-25 (remedial measures when lawyer learns of false information filed in connection with dissolution matter) and Informal Opinion 2020-24 (false testimony of client at deposition).

Informal Opinions are ethics advisory opinions issued by the Office of Legal Ethics Counsel to members of the Bar about Rule 4 (Rules of Professional Conduct), Rule 5 (Complaints and Proceedings Thereon), and Rule 6 (Fees to Practice Law) pursuant to Missouri Supreme Court Rule 5.30(c). Written summaries of select Informal Opinions are published for informational purposes as determined by the Advisory Committee of the Supreme Court of Missouri pursuant to Rule 5.30(c). Informal opinion summaries are advisory in nature and are not binding. These opinions are published as an educational service and do not constitute legal advice.

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USE OF ARTIFICIAL INTELLIGENCE IN A LAW PRACTICE

Adopted: November 01, 2024
Opinion discusses a lawyer's professional responsibility when using artificial intelligence in a law practice.

Editor's Note: There is an increasingly vast number of helpful resources on understanding Artificial Intelligence and the technology's interaction with the legal profession. The resources referenced in this opinion are not exhaustive but are intended to serve as a starting point for a lawyer's understanding of the topic. Over time, this editor's note may be updated as additional resources are published that staff concludes would be beneficial to lawyers.

Background:

"Artificial intelligence" (hereinafter, "AI") is a broad and evolving term encompassing myriad programs and processes with myriad capabilities. While a single definition of AI is not yet settled (and likely impossible), for the purposes of this opinion, the term "AI" refers to "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments." Nat'l Artificial Intelligence Initiative Act of 2020, Div. E, sec. 5002(3) (2021). Said in another, over-simplified way, AI is the use of computer science and extensive data sets to enable problem solving or decision-making; often through the implementation of sophisticated algorithms. AI encompasses, but is not limited to, both extractive and generative AI,1 natural language processing, large language models, and any number of machine learning processes.2 Examples of law-related AI programs range from online electronic legal research and case management software to e-discovery tools and programs that draft legal documents (e.g., a trial brief, will, etc.) based upon the lawyer's input of information that may or may not be client-specific.

Most lawyers have likely used some form of AI when practicing law, even if they didn't realize it (e.g., widely used online legal research subscription services utilize a type of extractive AI, or a program that "extracts" information relevant to the user's inquiry from a large set of existing data upon which the program has been trained). Within the year preceding the date of this opinion, generative AI programs that *create* products in response to a user's request based upon a large set of existing data upon which the program has been trained (e.g., Chat-GPT) have grown in capability and popularity, generating both positive and negative reactions regarding the integration of these technological breakthroughs in the legal profession.3 It is unquestioned that AI can be used in the practice of law to increase efficiency and consistency in the provision of legal services. However, AI and its work product can be inaccurate or unreliable despite its appearance of reliability when used during the provision of legal services.4

Inquiry #1:

Considering the advantages and disadvantages of using AI in the provision of legal services, is a lawyer permitted to use AI in a law practice?

Opinion #1:

Yes, provided the lawyer uses any AI program, tool, or resource competently, securely to protect client confidentiality, and with proper supervision when relying upon or implementing the AI's work product in the provision of legal services.

On the spectrum of law practice resources, AI falls somewhere between programs, tools, and processes readily used in law practice today (e.g. case management systems, trust account management programs, electronic legal research, etc.) and nonlawyer support staff (e.g. paralegals, summer associates, IT professionals, etc.). Nothing in the Rules of Professional Conduct specifically addresses, let alone prohibits, a lawyer's use of AI in her law practice. However, should a lawyer choose to employ AI in her practice, the lawyer must do so competently, the lawyer must do so securely, and the lawyer must exercise her independent judgment in supervising the use of such processes in her practice.

Rule 1.1 prohibits lawyers from "handl[ing] a legal matter that the lawyer knows or should know he or she is not competent to handle[,]" and goes on to note that "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Comment 8 to Rule 1.1 recognizes the reality of advancements in technology impacting a lawyer's practice, and states that part of a lawyer's duty of competency is to "keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice[.]" Rule 1.6(c) requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Rule 5.3 requires a lawyer to "make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[,]" and further requires that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[.]" Rules 5.3(a) and (b). The requirements articulated in Rule 5.3 apply to nonlawyer assistants within a law firm as well as those outside of a law firm that are engaged to provide assistance in the lawyer's provision of legal services to clients, such as third-party software companies. *See* 2011 FEO 6 ("Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer.").

A lawyer may use AI in a variety of manners in connection with her law practice, and it is a lawyer's responsibility to exercise her independent professional judgment in determining how (or if) to use the product of an AI tool in furtherance of her representation of a client. From discovery and document review to legal research, drafting contracts, and aggregating/analyzing data trends, the possibilities for employing AI in a law practice are increasingly present and constantly evolving. A lawyer's decision to use and rely upon AI to assist in the lawyer's representation of a client is generally hers alone and one to be determined depending upon a number of factors, including the impact of such services, the cost of such services, and the

reliability of the processes. This opinion does not attempt to dictate when and how AI is appropriate for a law practice.5

Should a lawyer decide to employ AI in the representation of a client, however, the lawyer is fully responsible for the use and impact of AI in the client's case. The lawyer must use the AI tool in a way that meets the competency standard set out in Rule 1.1. Like other software, the lawyer employing an AI tool must educate herself on the benefits and risks associated with the tool, as well as the impact of using the tool on the client's case. Educational efforts include, but are not limited to, reviewing current and relevant resources on AI broadly and on the specific program intended for use during the provision of legal services. A lawyer that inputs confidential client information into an AI tool must take steps to ensure the information remains secure and protected from unauthorized access or inadvertent disclosure per Rule 1.6(c). Additionally, a lawyer utilizing an outside third-party company's AI program or service must make reasonable efforts to ensure that the program or service used is compatible with the lawyer's responsibilities under the Rules of Professional Conduct pursuant to Rule 5.3. Whether the lawyer is reviewing the results of a legal research program, a keyword search of emails for production during discovery, proposed reconciliations of the lawyer's trust account prepared by a long-time assistant, or a risk analysis of potential borrowers for a lender-client produced by an AI process, the lawyer is individually responsible for reviewing, evaluating, and ultimately relying upon the work produced by someone—or something—other than the lawyer.

Inquiry #2:

May a lawyer provide or input a client's documents, data, or other information to a third-party company's AI program for assistance in the provision of legal services?

Opinion #2:

Yes, provided the lawyer has satisfied herself that the third-party company's AI program is sufficiently secure and complies with the lawyer's obligations to ensure any client information will not be inadvertently disclosed or accessed by unauthorized individuals pursuant to Rule 1.6(c).

At the outset, the Ethics Committee does not opine on whether the information shared with an AI tool violates the attorney-client privilege, as the issue is a legal question and outside the scope of the Rules of Professional Conduct. A lawyer should research and resolve any question on privilege prior to engaging with a third-party company's AI program for use in the provision of legal services to a client, particularly if client-specific information will be provided to the AI program.

This inquiry is akin to any lawyer providing confidential information to a third-party software program (practice management, cloud storage, etc.), on which the Ethics Committee has previously opined. As noted above, a lawyer has an obligation to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information

relating the representation of the client." Rule 1.6(c). What constitutes "reasonable efforts" will vary depending on the circumstances related to the practice and representation, as well as a variety of factors including the sensitivity of the information and the cost or benefit of employing additional security measures to protect the information. Rule 1.6, cmt. [19]. Ultimately, "[a] lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties" when using technology to handle, communicate, analyze, or otherwise interact with confidential client information. 2008 FEO 5; *see also* 2005 FEO 10; 2011 FEO 6.

The Ethics Committee in 2011 FEO 6 recognized that employing a third party company's services/technology with regards to confidential client information requires a lawyer to exercise reasonable care when selecting a vendor. The opinion states:

[W]hile the duty of confidentiality applies to lawyers who choose to use technology to communicate, this obligation does not require that a lawyer use only infallibly secure methods of communication. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality....A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of [technology] that the lawyer is required to apply when representing clients.

2011 FEO 6 (internal citations omitted). In exercising reasonable care, the opinion discusses a sample of considerations for evaluating whether a particular third party company's services are compatible with the lawyer's professional responsibility, including:

• The experience, reputation, and stability of the company;

• Whether the terms of service include an agreement on how the company will handle confidential client information, including security measures employed by the company to safeguard information provided by the lawyer; and

• Whether the terms of service clarify how information provided to the company will be retrieved by the lawyer or otherwise safely destroyed if not retrieved should the company go out of business, change ownership, or if services are terminated.

2011 FEO 6; *see* Rule 5.3. A proposed ethics opinion from the Florida Bar on a lawyer's use of AI adds that lawyers should "[d]etermine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information" when determining whether a third party company's technological services are compatible with the lawyer's duty of confidentiality. *See* Florida Bar Proposed Advisory Opinion 24-1 (published Nov. 13, 2023). Furthermore, this duty of reasonable care continues beyond initial selection of a service, program, or tool and extends throughout the lawyer's use of

the service. A lawyer should continuously educate herself on the selected technology and developments thereto—both individually and by "consult[ing] periodically with professionals competent in the area of online security"—and make necessary adjustments (including abandonment, if necessary) when discoveries are made that call into question services previously thought to be secure. 2011 FEO 6.

The aforementioned considerations—including the consideration regarding ownership of information articulated by the Florida Bar opinion—are equally applicable to a lawyer's selection and use of a third party company's AI service/program. Just as with any third-party service, a lawyer has a duty under Rule 5.3 to make reasonable efforts to ensure the third-party AI program or service is compatible with the lawyer's professional responsibility, particularly with regards to the lawyer's duty of confidentiality pursuant to Rule 1.6. Importantly, some current AI programs are publicly available to all consumers/users, and the nature of the AI program is to retain and train itself based on the information provided by any user of its program. Lawyers should educate themselves on the nature of any publicly available AI program intended to be used in the provision of legal services, with particular focus on whether the AI program will retain and subsequently use the information provided by the user. Generally, and as of the date of this opinion, lawyers should avoid inputting client-specific information into publicly available AI resources.

Inquiry #3:

If a firm were to have an AI software tool initially developed by a third-party but then used the AI tool in-house using law firm owned servers and related infrastructure, does that change the data security requirement analysis in Opinion #2?

Opinion #3:

No. Lawyer remains responsible for keeping the information secure pursuant to Rule 1.6(c) regardless of the program's location. While an in-house program may seem more secure because the program is maintained and run using local servers, those servers may be as much if not more vulnerable to attack because a lawyer acting independently may not be able to match the security features typically employed by larger companies whose reputations are built, in part, on security and customer service. A lawyer who plans to independently store client information should consult an information technology/cybersecurity expert about steps needed to adequately protect the information stored on local servers.

Relatedly, AI programs developed for use in-house or by a particular law practice may also be derivatives of a single, publicly available AI program; as such, some of these customized programs may continue to send information inputted into the firm-specific program back to the central program for additional use or training. Again, prior to using such a program, a lawyer must educate herself on the nuances and operation of the program to ensure client information will remain protected in accordance with the lawyer's professional responsibility. The list of considerations found in Opinion #2 offers a starting point for questions to explore when identifying, evaluating, and selecting a vendor.

Inquiry #4:

If a lawyer signs a pleading based on information generated from AI, is there variation from traditional or existing ethical obligations and expectations placed on lawyers signing pleadings absent AI involvement?

Opinion #4:

No. A lawyer may not abrogate her responsibilities under the Rules of Professional Conduct by relying upon AI. Per Rule 3.1, a lawyer is prohibited from bringing or defending "a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous[.]" A lawyer's signature on a pleading also certifies the lawyer's good faith belief as to the factual and legal assertions therein. *See* N.C. R. Civ. Pro. 11 ("The signature of an attorney...constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."). If the lawyer employs AI in her practice and adopts the tool's product as her own, the lawyer is professionally responsible for the use of the tool's product. *See* Opinion #1.

Inquiry #5:

If a lawyer uses AI to assist in the representation of a client, is the lawyer under any obligation to inform the client that the lawyer has used AI in furtherance of the representation or legal services provided?

Opinion #5:

The answer to this question depends on the type of technology used, the intended product from the technology, and the level of reliance placed upon the technology/technology's product. Ultimately, the attorney/firm will need to respond to each case and each client individually. Rule 1.4(b) requires an attorney to explain a matter to her client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Generally, a lawyer need not inform her client that she is using an AI tool to complete ordinary tasks, such as conducting legal research or generic case/practice management. However, if a lawyer delegates substantive tasks in furtherance of the representation to an AI tool, the lawyer's use of the tool is akin to outsourcing legal work to a nonlawyer or other third-party resource or service, for which the client's advanced informed consent is required. *See* 2007 FEO 12. Additionally, if the decision to use or not use an AI tool in the case requires the client's input with regard to fees, the lawyer must inform and seek input from the client. As stated before, it is ultimately a lawyer's professional responsibility to exercise independent judgment when deciding to use or rely upon the work product of any outsourced, third-party service. *See* 2007 FEO 12; Opinions #1 & 4.

Inquiry #6:

Lawyer has an estate planning practice and bills at the rate of $300 per hour. Lawyer has integrated an AI program into the provision of legal services, resulting in increased efficiency and work output. For example, Lawyer previously spent approximately three hours drafting standard estate planning documents for a client; with the use of AI, Lawyer now spends only one hour preparing those same documents for a client. May Lawyer bill the client for the three hours of work that the prepared estate documents represent?

Opinion #6:

No, Lawyer may not bill a client for three hours of work when only one hour of work was actually experienced. A lawyer's billing practices must be accurate, honest, and not clearly excessive. Rules 7.1, 8.4(c), and 1.5(a); *see also* 2022 FEO 4. If the use of AI in Lawyer's practice results in greater efficiencies in providing legal services, Lawyer may enjoy the benefit of those new efficiencies by completing more work for more clients; Lawyer may not inaccurately bill a client based upon the "time-value represented" by the end product should Lawyer not have used AI when providing legal services.

Rather than billing on an hourly basis, Lawyer may consider billing clients a flat fee for the drafting of documents—even when using AI to assist in drafting—provided the flat fee charged is not clearly excessive and the client consents to the billing structure. *See* 2022 FEO 4.

Relatedly, Lawyer may also bill a client for expenses incurred related to Lawyer's use of AI in the furtherance of a client's legal services, provided the expenses charged are accurate, not clearly excessive, and the client consents to the charge, preferably in writing. *See* Rule 1.5(b). Such costs include:

• a lawyer's use of AI that is specifically identified and directly related to the legal services provided to the client during the representation; or

• a general administrative fee to cover the costs of generic expenses incurred during the representation for the benefit of the client, e.g., copies, printing, postage, or general technology-related expenses—including AI—that are implemented to improve services or client convenience.

Endnotes

1. For a better understanding of the differences between *extractive and generative AI, see Jake Nelson, Combining Extractive and Generative AI for New Possibilities*, LexisNexis (June 6, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/combining-extractive-and-generative-ai-for-new-possibilities (last visited January 10, 2024).

2. For an overview of the state of AI as of the date of this opinion, *see What is Artificial Intelligence (AI)?*, IBM, ibm.com/topics/artificial-intelligence (last visited January 10, 2024). For information on how AI relates to the legal profession, *see AI Terms for Legal Professionals: Understanding What Powers Legal Tech*, LexisNexis (March 20, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/ai-terms-for-legal-professionals-understanding-what-powers-legal-tech (last visited January 10, 2024).

3. John Villasenor, *How AI Will will Revolutionize the Practice of Law*, Brookings Institution (March 20, 2023), brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/ (last visited January 10, 2024); Steve Lohr, *AI is Coming for Lawyers Again*, New York Times (April 10, 2023), nytimes.com/2023/04/10/ technology/ai-is-coming-for-lawyers-again.html (last visited January 10, 2024).

4. Larry Neumeister, *Lawyers Blame ChatGPT for Tricking Them Iinto Citing Bogus Case Law*, AP News (June 8, 2023), apnews.com/article/artificial-intelligence-chatgpt-courts-e15023d7e6fdf4f099aa 122437dbb59b (last visited January 10, 2024).

5. In certain circumstances a lawyer may need to consult a client about employing AI in the provision of legal services to that client, *see* Opinion #5, below.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 13
	)	
Marla C. Martin,	)	Case No. 24 B 13368
	)	
Debtor.	)	Honorable Michael B. Slade
	)	

MEMORANDUM OPINION FINDING VIOLATION OF BANKRUPTCY RULE 9011 AND IMPOSING SANCTIONS

On June 11, 2025, I issued an order directing the Semrad Law Firm, LLC ("Semrad") and Thomas E. Nield to show cause why they should not be sanctioned for filing a brief containing fake quotations and nonexistent authority manufactured by artificial intelligence and why their compensation does not exceed the reasonable value of their services pursuant to 11 U.S.C. § 329. (Dkt. No. 56) Semrad then withdrew the offending brief (*see* Dkt. No. 58 (withdrawing Dkt. No. 51)), and it and Mr. Nield separately responded to my show cause order. (*See* Dkt. Nos. 67, 71) Semrad also withdrew its application for compensation in this case. (*See* Dkt. No. 68) The United States Trustee and Chapter 13 Trustee both argue that I should sanction Semrad and Mr. Nield (*see* Dkt. Nos. 66 and 70) and it is now my duty to address the Show Cause Order.

While I appreciate Mr. Nield's and Semrad's remorse and candor, I find that they both violated Federal Rule of Bankruptcy Procedure 9011. I further find that a modest, joint-and-several sanction of $5,500, paid to the Clerk of the Bankruptcy Court, along with a requirement that Mr. Nield and another senior Semrad attorney attend an upcoming course on the dangers of AI scheduled for the National Conference of Bankruptcy Judges (NCBJ) annual meeting in September, is the least harsh sanction that will appropriately address counsel's conduct and deter future, similar misconduct from them and others. My reasons follow.

I.

On September 11, 2024, the Debtor and Semrad entered into this Court's form Court Approved Retention Agreement (CARA). Semrad filed the CARA along with the Debtor's signed voluntary petition under chapter 13 of the Bankruptcy Code and related papers on her behalf the next day. (*See* Dkt. No. 1)

This is the Debtor's eighth bankruptcy case. (*See* Dkt. No. 6) Each of the prior seven cases was dismissed for one reason or another. (*Id.*) Three of the Debtor's prior cases (Case Nos. 18-10082, 16-36239, 07-18870) were dismissed after confirmation because the Debtor failed to make plan payments. The other four (Case Nos. 18-02822, 16-36239, 07-13303, 07-01898) were dismissed before confirmation.

For its part, Semrad is a prolific filer of Chapter 13 cases; a material percentage of my docket consists of cases filed by that firm. And the Debtor and Semrad are very familiar with one another; Semrad had represented the Debtor in three prior bankruptcy cases before this one. Each time Semrad represented the Debtor before this case, the Debtor pursued and confirmed a chapter 13 plan, only to have her case dismissed when she was unable to comply with the plan's requirements. (*See* Case Nos. 18-10082, ECF Nos. 68 & 70; 12-28654, ECF Nos. 55, 56 & 65; 07-18870, ECF Nos. 74 & 75) And in each of those cases, Semrad petitioned for, and was awarded, attorneys' fees. In total, before this case, the Debtor had paid Semrad $8,958.45 for its services, but she is yet to complete a bankruptcy case successfully to earn a discharge.[1]

[1] According to the chapter 13 trustee's final report and account filed August 31, 2020, in Case No. 18-10082 (Dkt. No. 72), the trustee paid $894.45 to Semrad through the plan, and the debtor advanced $400 according to the fee application (Dkt. No. 16). According to the chapter 13 trustee's final report and account filed May 16, 2017, in Case No. 12-28654 (Dkt. No. 68), the trustee paid $3,500 to Semrad through the plan, and the debtor advanced $350 according to the fee application (Dkt. No. 14). And according to the chapter 13 trustee's final report and account filed February 24, 2009, in Case No. 07-18870 (Dkt. No. 77), the trustee paid $2,314 to Semrad through the plan, and the debtor advanced $1,500 according to the fee application (Dkt. No. 13).

This case has had its problems, too. The primary challenge posed by the Debtor's current situation is that she did not pay the real estate taxes owed on her Chicago home between 2012 and 2018. Creditor Corona Investments, LLC acquired rights to those payments and an associated tax lien secured by her home. The Debtor's initial chapter 13 plan proposed a $1,600 monthly plan payment and would have paid Corona $74,735, providing 0% interest. (Dkt. No. 10 §§ 2.1, 3.2) That was obviously wrong, and Corona (since even before my appointment to the bench) objected to the Debtors' initial plan long ago, pointing out the error. (*See* Dkt. No. 14 (*citing* 35 Ill. Comp. Stat. 200/21-75 and *In re Lamont*, 740 F.3d 397, 404 (7th Cir. 2014))

To give the Debtor a fair chance to confirm a plan that could save her home and the substantial equity she has in it, my predecessor and I continued the Debtor's confirmation hearing eight times to facilitate negotiations between her and Corona. (*See* Dkt. Nos. 16, 20, 25, 29, 32, 37, 40, 46)[2] Despite these efforts, after I entered a briefing schedule to consider Corona's objection (Dkt. No. 45), and briefs were filed (*see* Dkt. Nos. 49 & 51), I advised Semrad that I could not possibly confirm the then-latest proposed Plan because, even *if* I overruled Corona's objection, the Plan was clearly not feasible: it proposed to pay creditors $2,400 per month (*see* Dkt. No. 43 § 2.1), while the schedules swore that the Debtor's disposable income was only $1,600 per month (*see* Dkt. No. 1, Schedule J, Line 23(c)). When I pointed out that straightforward feasibility problem on June 10, Semrad advised the schedules on file were incorrect and the Debtor had more income than sworn. Which is its own problem. And while Debtor's counsel later filed amended schedules (Dkt. No. 72) and an amended Plan that matched them (Dkt. No. 73), the amended Plan did not comply with an order I had entered that required

[2] The Chapter 13 Trustee dutifully pointed out the problems with Debtor's counsel's work since the beginning and asked that the case be dismissed last fall. (*See* Dkt. No. 19) My predecessor and I collectively continued the Trustee's motion to dismiss seven times, for the same reason: to give the Debtor every reasonable opportunity to confirm a plan to save her home, if possible. (*See* Dkt. Nos. 21, 27, 31, 39, 42, 48, 54)

any amended plan to be signed by both the Debtor and her counsel. (*Compare* Dkt. No. 55 at 2 (order requiring Debtor's signature) *with* (Dkt. No. 73) (amended plan lacking signature))

I required the Debtor's signature on any proposed amended plan for a good reason. On March 6, 2025, Debtor's counsel signed and filed on behalf of the Debtor a proposed Plan that (if confirmed) would have required the Debtor to make monthly plan payments of $2,600 for 60 months and to provide 18% interest to Corona on its claim. (*See* Dkt. No. 35, §§ 2.1, 3.2) But on April 8, 2025, the Debtor personally appeared in Court (while Mr. Nield appeared via Zoom) and told me that she did not agree with the plan that her counsel had filed—suggesting the plan had been filed without her approval. Then, at the next hearing on June 10, 2025, when I asked Mr. Nield whether the Debtor was on board with a further-amended Plan (a question to which there are only two potential answers, yes or no), he equivocated, said that she "is, in some sense, in agreement with it" because she had made one monthly payment of $2,400 (the revised monthly payment called for in the then-current proposed Plan), while also confirming she had not signed off on the filing of amended schedules that would make that Plan feasible. (*See* Dkt. No. 65 (6/10/25 Hr'g Tr.)) That is why my June 10 order required "that both the Debtor *and* the Debtor's counsel sign any amended plan before it is filed." (*See* Dkt. No. 55 at 2 (emphasis in original)) Unfortunately, neither directive was honored; Semrad filed an amended plan without the Debtor's signature eight days after the deadline. (*See* Dkt. No. 73)

The Plan was finally confirmed earlier this week (*see* Dkt. No. 75), but suffice it to say that I have real concerns about the way that this case has been handled. I expect materially more care from Debtor's counsel. And the Chapter 13 Trustee has expressed broader concerns about Debtor's counsel generally, alleging (among other things) that Semrad often has clients sign blank signature forms, which leads to the filing of inaccurate sworn declarations, and often files

cases without possessing (or being able to procure on a timely basis) basic documents necessary to prosecute any Chapter 13 case. (*See* Dkt. No. 69 (Chapter 13 Trustee's Response to Court's Rule to Show Cause))

The Chapter 13 Trustee's allegations are very serious. But I am not taking the allegations into account in this ruling because Semrad did not have an opportunity to respond to them, they relate primarily to the section 329 examination that is unnecessary given Semrad's withdrawal of its fee petition, and the reason for the Order to Show Cause was limited to the fake citations in Semrad's response brief. However, the allegations are consistent with my general observation that Semrad should be taking more care when filing and prosecuting Chapter 13 cases than has been shown here.

II.

I described in my Show Cause Order (Dkt. No. 56) the problem that led us here. To summarize: I entered a briefing schedule to help me resolve the dispute between the Debtor and Corona; it required Corona to file a written objection to the proposed plan while giving the Debtor a chance to respond. (Dkt. No. 45) Corona then filed a "kitchen sink" objection, disputing feasibility and challenging the plan treatment offered to it and other creditors. (Dkt. No. 49) The Debtor's response—signed by Mr. Nield and Semrad on her behalf—argued that Corona lacked standing to make any arguments other than disputes over the treatment of Corona's own claim. (*See* Dkt. No. 51)

While the argument that creditors lack standing to complain about the treatment of other creditors if it does not impact the objector directly rang true, the claim that Corona lacked standing to object to *feasibility* did not. So my staff and I began to examine the issue in depth to see if Semrad's argument was supported by the caselaw. We found the following:

What Counsel's Brief Claimed	What Actually Exists
"*In re Montoya*, 341 B.R. 41 (Bankr. D. Utah 2006). The court held that '[a] secured creditor's standing to object to confirmation is limited to issues that affect its rights directly.' Secured creditors cannot object based on disposable income or plan feasibility because those issues do not impact their claims." (Dkt. No. 51, at 1-2)	*In re Montoya*, 341 B.R. 41 (Bankr. D. Utah 2006) exists, and the citation is correct. However, not only does the language quoted by counsel not appear anywhere in the court's opinion, but the opinion does not address issues of standing at all. The opinion certainly does not dispute a secured creditor's right to challenge the feasibility of a chapter 13 plan.
"*In re Jager*, 344 B.R. 349 (Bankr. D. Colo. 2006). The court found that secured creditors are 'not entitled to raise objections related to other creditors or the debtor's disposable income.' These objections fall within the purview of the Chapter 13 trustee." (Dkt. No. 51, at 2)	*In re Jager*, 344 B.R. 349 (Bankr. D. Colo. 2006) does not exist.
"*In re Coleman*, 373 B.R. 907 (Bankr. W.D. Wis. 2007). A secured creditor may only object to confirmation where 'the plan proposes to alter the treatment of its secured claim in violation of §1325(a)(5).' Here, there is a limited issue regarding Corona's rights as they pertain to § 1325(a)(5), none of which are brought up in lines 16-20." (Dkt. No. 51, at 2)	*In re Coleman*, 373 B.R. 907 exists, although the case is from the Bankruptcy Court in the Western District of Missouri, not Wisconsin. Again, not only does counsel's quotation not appear in the case at all, the opinion does not discuss the proposition for which it is cited, let alone support it.
"*In re Russell*, 458 B.R. 731 (Bankr. E.D. Wis. 2011). The Court said 'A secured creditor's standing is limited to objecting to the treatment of its claim. It lacks standing to object to confirmation based on issues like feasibility or disposable income that do not directly impact its rights.'" (Dkt. No. 51, at 2)	*In re Russell*, 458 B.R. 731, exists, although the case is from the Bankruptcy Court in the Eastern District of Virginia, not Wisconsin, and is from 2010, not 2011. Yet again, the quotation from counsel's brief does not appear anywhere in the court's opinion, and the opinion does not touch on the topic of standing at all.

In sum, what happened here is that Mr. Nield cited four cases for a proposition of law, but none of them exist as alleged in his brief. Worse still, none of the quotations relied upon in the Semrad brief are actual statements written by any court.

I raised the problems created by these apparently fake citations at the hearing on June 10. I asked Mr. Nield directly whether he used some sort of AI to come up with this portion of his brief, and he stated the following: "I think the citation element of these cases, I guess, was – I ran it through AI to some extent, but I didn't think that the citation was wrong." (Dkt. No. 65,

6/10/25 Hr'g Tr. at 20:10-13) I then issued my Show Cause Order (Dkt. No. 56), describing the problem in detail and directing both Mr. Nield and Semrad to respond.

To his credit, Mr. Nield appears to both understand what he did wrong and to be remorseful for it. He states that he "had never used AI to do any legal research prior to this specific instance," and he "simply entered queries into the program which elicited problems." (Dkt. No. 71 at 2) Mr. Nield then "did not review the relevant, underlying quotes from the opinions cited by the AI program" because he "assumed that an AI program would not fabricate quotes entirely." (*Id.*) Mr. Nield promises that he will never again use an AI program to do legal research "without checking every element of the AI's work product" and advises that he "has self-reported his behavior to the IARDC and is willing to take steps this Court deems necessary to ensure this never happens again." (*Id.* at 3)

For its part, Semrad states that, as a firm, it "strictly prohibits using AI for legal research or the generation of legal citations without manual verification" and that Mr. Nield's use of ChatGPT for this purpose was "outside of the firm's research protocol." (Dkt. No. 67 at 1–2) Semrad does not identify how it communicated that restriction on AI use to its attorneys and staff or what the firm's "research protocol" was prior to this case, but claims to have conducted an internal investigation (of unspecified breadth) which did not reveal other instances of improper AI usage prior to this one. (*Id.* at 2) That said, in recognition of the problem here, Semrad (1) withdrew its request for compensation in this case; (2) created a formal Artificial Intelligence Policy (which went into effect after, and as a result of, this incident); (3) required all attorneys at the firm to complete online CLE training in the "ethical and appropriate use of AI in legal practice"; and (4) offered to reimburse opposing counsel for time reviewing the offending brief. (*Id.* at 2-3)

III.

Federal Rule of Bankruptcy Procedure 9011(b)(2) provides that:

> By presenting to the court a petition, pleading, written motion, or other document—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that, to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument to extend, modify, or reverse existing law, or to establish new law.

What happened here does not appear to have been addressed in a published Bankruptcy Court opinion before, but there is a body of District Court cases where counsel submitted briefs containing fake cases or quotations "hallucinated" by AI, and Federal Rule of Civil Procedure 11 is "essentially identical" to Bankruptcy Rule 9011. *Baermann v. Ryan (In re Ryan)*, 411 B.R. 609, 613 (Bankr. N.D. Ill. 2009). The holdings of those District Court cases are both uniform and highly persuasive: "At the very least, the duties imposed by Rule 11 require that attorneys read, *and thereby confirm the existence and validity of*, the legal authorities on which they rely." *Benjamin v. Costco Wholesale Corp.*, No. 24-cv-7399, 2025 WL 1195925, at *5 (E.D.N.Y. Apr. 24, 2025) (quoting *Park v. Kim*, 91 F.4th 610, 615 (2d Cir. 2024) (emphasis added in *Benjamin*)).[3] It is undisputed that Mr. Nield did not do so. Thus, he violated Federal Rule 9011.

The sanctions available for violations of Rule 9011 include a nonmonetary directive, an order to pay a penalty into court, or in some circumstances an order directing the violator to pay

[3] *See also, e.g.*, *Mid Central Operating Engineers Health & Welfare Fund v. HoosierVac LLC*, No. 24-cv-00326, 2025 WL 574234, at *3, 5 (S.D. Ind. Feb. 21, 2025) (recommending sanctions for citing authorities "hallucinate[d]" by artificial intelligence in court filings); *Gauthier v. Goodyear Tire & Rubber Co.*, No. 23-CV-281, 2024 WL 4882651, at *3 (E.D. Tex. Nov. 25, 2024) (imposing sanctions under Fed. R. Civ. Pro. 11(b) for filing a brief that included fake case law generated by artificial intelligence "without reading the cases cited, or even confirming the existence or validity of the cases included"); *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 465 (S.D.N.Y. 2023) (same); *Garner v. Kadince, Inc.*, No. 20250188-CA, 2025 WL 1481740, at *3 (Utah Ct. App. May 22, 2025) (same).

his or her opponent's attorneys' fees. *See* Fed. R. Bankr. P. 9011(c)(4). And where (as here) sanctions are to be imposed, "[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." Fed. R. Bankr. P. 9011(c)(1). But sanctions "must be limited to what suffices to deter repetition of the conduct or deter comparable conduct by others similarly situated." Fed. R. Bankr. P. 9011(c)(4).

As I advised in my Show Cause Order, courts in similar cases have issued monetary sanctions of up to $15,000, along with various non-monetary sanctions. (Dkt. No. 56 at 3)[4] Below is a chart detailing the sanctions imposed in some of the recent similar cases:

Case	Facts	Sanctions
Wadsworth v. Walmart Inc., 348 F.R.D. 489 (D. Wyo. 2025)	Plaintiff's counsel filed Motions in Limine citing nine cases; eight did not exist. Following an Order to Show Cause, the attorneys admitted that the cases were hallucinated by an AI platform. The drafter stated that it was his first time using AI in this way and he didn't learn the cases were questionable until the Court asked him to Show Cause. After the Order to Show Cause issued, counsel: (1) withdrew the Motions, (2) were forthcoming about the use of AI, (3) paid opposing counsel's fees for defending the Motions, and (4) implemented policies and training to prevent another occurrence.	The Court revoked the drafter's pro hac vice status and imposed a $3,000 fine. The Court also imposed a sanction of $1,000 on each of the two attorneys who signed, but did not draft, the motions (for a total of $5,000 in fines).
Mid Cent. Operating Eng'rs Health & Welfare Fund v. HoosierVac LLC, No. 24-cv-00326, 2025 WL 574234 (S.D. Ind. Feb. 21, 2025)	Defendant's counsel filed a brief that cited an alleged Seventh Circuit case the magistrate judge could not locate because it was fake. The magistrate judge reviewed counsel's prior submissions and found similar issues in two other briefs. After the magistrate judge issued an Order to Show Cause, the lawyer admitted his error and took CLE courses on AI use.	The magistrate judge recommended that counsel be sanctioned $15,000. The District Court adopted the recommendation but reduced the penalty to $6,000. *Mid Cent. Operating Eng'rs Health & Welfare Fund v. HoosierVac LLC*, No. 24-cv-00326, 25 WL 1511211 (S.D. Ind. May 28, 2025).

[4] *See also Attaway v. Illinois Dep't of Corr.*, No. 23-cv-2091, 2025 WL 1101398, at *3 (S.D. Ill. Apr. 14, 2025) ("With the rise of incorrect citations and new emerging technologies, courts have assessed monetary sanctions anywhere from $2,000 to $15,000 for violations similar to Plaintiff's conduct.").

Case	Facts	Sanctions
Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023)	Plaintiff's counsel filed an "Affirmation in Opposition" to Defendant's motion, which cited and quoted purported judicial decisions that did not exist. After Defendant's counsel pointed out the flaws with Plaintiff's cited case law, Plaintiff's counsel did not withdraw the offending brief or volunteer an explanation to the Court. At the hearing on the Court's subsequent Order to Show Cause, authoring counsel revealed that he had used ChatGPT, claiming he had not known that ChatGPT was capable of making up cases, and signing counsel admitted that he reviewed the Affirmation for style but made no inquiry into the author's research, even though the author had no familiarity with the law at issue.	The attorneys were required to send the sanctions opinion, the Affirmation, and the sanctions hearing transcript, with a cover letter, to their client and to each judge falsely identified as the author of a fabricated opinion (and to file copies of the letters sent on the case docket). In addition, the Court imposed a $5,000 joint and several penalty on the attorneys.
Coomer v. Lindell, Case No. 22-cv-01129, 2025 WL 1865282 (D. Colo. July 7, 2025)	Defense counsel filed a brief that contained erroneous AI-generated citations. They claimed a prior draft had been mistakenly filed, rather than a corrected final version. However, the alleged final version they contended they meant to upload had many of the same erroneous citations, among other deficiencies. The Court also took judicial notice that Defense counsel took steps to correct similar issues in a brief filed before a different federal court just days after it had issued the order to show cause in this matter.	Two lawyers were each ordered to pay $3,000 (for a total of $6,000), and one of the penalties was jointly and severally ordered against the lawyer and his law firm.
Benjamin v. Costco Wholesale Corp., No. 24-CV-7399, 2025 WL 1195925 (E.D.N.Y. Apr. 24, 2025)	The Court was unable to locate five out of seven cases cited by Plaintiff's counsel in a reply brief and issued an Order to Show Cause. In her Response, Plaintiff's counsel admitted that the five cases did not exist, said she used an AI platform called ChatOn, and claimed she failed to sufficiently review the reply before filing it because she was pressed for time. She stated she had never used AI for anything	The Court ordered counsel to identify (1) the two CLE classes that she already took and whether she was required to pay for them; and (2) the prospective CLE classes she intended to take. After receiving that information, the Court issued a monetary sanction of $1,000.

Case	Facts	Sanctions
	law related before, and informed the Court that she took and intended to take CLE classes regarding the use of AI in federal court practice.	
Ramirez v. Humala, No. 24-CV-242, 2025 WL 1384161 (E.D.N.Y. May 13, 2025)[5]	Four of eight cases cited by Plaintiff's counsel were hallucinated by AI, and the Court issued a Show Cause Order. In response, Plaintiff's counsel admitted the error, apologized, and conducted a full internal investigation.	The Court ordered a joint and several penalty of $1,000 on the attorney and her law firm.

Mr. Nield and Semrad ask me not to sanction them at all given that they have already voluntarily: (1) admitted their misconduct and promised not to do it again; (2) withdrawn any application for compensation in this case; and (3) watched an online CLE video. But while I appreciate their candor and efforts, "[t]here must be consequences." *Ferris v. Amazon.com Servs., LLC*, No. 24-cv-304, 2025 WL 1122235, at *2 (N.D. Miss. Apr. 16, 2025). While I believe this mistake was unintentional, a "citation to fake, AI-generated sources . . . shatters [] credibility" and "imposes many harms." *Kohls v. Ellison*, No. 24-cv-3754, 2025 WL 66514, at *4–5 (D. Minn. Jan. 10, 2025). So the consequences "are steep." *Id.* at *5.

[5] I reviewed the unpublished opinions that Mr. Nield referred to in his brief (*see* Dkt. 71 at p. 4-5) and they do not change my thinking in this case. The Memorandum Opinion in *Iron Tax, Accounting & Fin. Sols., LLC v. Story Law Firm, P.L.L.C.*, No. 23-CV-5243 (W.D. Ark. April 8, 2025), ECF No. 49, attached as Exhibit B to Mr. Nield's brief, merely includes a footnote (at page 16, n.2) in resolving summary judgment and *Daubert* motions that flags (presumably for the first time) counsel misciting a few cases, commenting that "short of the use of AI, it is unclear how such errors would slip past a reasonably diligent attorney." That the Court declined to pursue the matter further for reasons unknown does not weigh against imposing sanctions here. In *Araujo v. Wedelstadt*, No. 23-cv-1190 (E.D. Wis. Jan 22, 2025), the offending lawyer realized the errors in his response before the court's consideration and amended the pleading identifying the incorrect citations. *Id.*, ECF Nos. 35, 38. The court's decision (attached as Exhibit C to Mr. Nield's brief, *see* Dkt. 71, Ex. C) calls the use of AI "unacceptable," but let counsel off with only a warning, presumably on account of his rectifying the error early. I also reviewed the transcript that Mr. Nield attached as Exhibit A to his brief, where a court declined to sanction counsel after finding, among other things, that the offending attorney had already experienced "adverse" publicity from his misconduct that "sent the necessary message" not to do it again. Hr'g Tr. at 18:1–4, *Iovino v. Michael Stapleton Associates, Ltd.*, No. 21-CV-64 (W.D. Va. Oct. 30, 2024), ECF No. 204. To me, these outcomes are at the lenient end of a spectrum of various responses a Court can have to this situation. For the reasons I give in this opinion, I believe a modest sanction is appropriate here.

The first reason I issue sanctions stems from Mr. Nield's claim of ignorance—he asserts he didn't know the use of AI in general and ChatGPT in particular could result in citations to fake cases. (Dkt. No. 71 at 3) Mr. Nield disputes the court's statement in *Wadsworth* that it is "well-known in the legal community that AI resources generate fake cases." 348 F.R.D. at 497. Indeed, Mr. Nield aggressively chides that assertion, positing that "in making that statement, the *Wadsworth* court cited no study, law school journal article, survey of attorneys, or *any* source to support this blanket conclusion." (Dkt. No. 71 at 3–4, emphasis in Mr. Nield's brief as filed)

I find Mr. Nield's position troubling. At this point, to be blunt, any lawyer unaware that using generative AI platforms to do legal research is playing with fire is living in a cloud. This has been a hot topic in the legal profession since at least 2023, exemplified by the fact that Chief Justice John G. Roberts, Jr. devoted his 2023 annual Year-End Report on the Federal Judiciary (in which he "speak[s] to a major issue relevant to the whole federal court system," Report at 2) to the risks of using AI in the legal profession, including hallucinated case citations.[6] To put it mildly, "[t]he use of non-existent case citations and fake legal authority generated by artificial intelligence programs has been the topic of many published legal opinions and scholarly articles as of late."[7] At this point there are *many* published cases on the issue—while only a sampling are cited in this opinion, all but one were issued before June 2, 2025, when Mr. Nield filed the offending reply. *See, e.g.*, Jaclyn Diaz, *A Recent High-Profile Case of AI Hallucination Serves*

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6 *Available at* https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

7 *O'Brien v. Flick*, No. 24-61529-CIV, 2025 WL 242924, at *6 (S.D. Fla. Jan. 10, 2025); *see also Willis v. U.S. Bank Nat'l Ass'n,* No. 25-cv-516, 2025 WL 1408897, at *1 (N.D. Tex. May 15, 2025) ("It is no secret that generative AI programs are known to 'hallucinate' nonexistent cases, and with the advent of AI, courts have seen a rash of cases in which both counsel and *pro se* litigants have cited such fake, hallucinated cases in their briefs.") (quoting *Sanders v. United States*, 176 Fed. Cl. 163, 169 (2025); *Evans v. Robertson*, No. 24-13435, 2025 WL 1483449, at *2 (E.D. Mich. May 21, 2025) (same, with same quote); *Benjamin*, 2025 WL 1195925, at *1 (citing the numerous judicial opinions in recent weeks and months that address the "epidemic" of lawyers citing fake cases after using AI to perform legal research).

as a Stark Warning, NPR ILLINOIS (July 10, 2025, 12:49 PM), https://www.nprillinois.org/2025-07-10/a-recent-high-profile-case-of-ai-hallucination-serves-as-a-stark-warning ("There have been a host of high-profile cases where the use of generative AI has gone wrong for lawyers and others filing legal cases . . . . It has become a familiar trend in courtrooms across the U.S."). The Sedona Conference wrote on the topic in 2023.[8] Newspapers, magazines, and other well-known online sources have been publicizing the problem for at least two years.[9] And on January 1, 2025, the Illinois Supreme Court issued a "Supreme Court Policy on Artificial Intelligence" requiring practitioners in this state to "thoroughly review" any content generated by AI.[10]

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[8] *See, e.g.*, Hon. Xavier Rodriguez, *Artificial Intelligence (AI) and the Practice of Law*, 24 SEDONA CONF. J. 783, 784, 791 (2023) ("[T]here is a need for education in the legal community to understand errors or 'hallucinations' that may occur in the output of the [large language models] powering these platforms. Attorneys and courts need to be aware of both the benefits and limitations that these AI platforms present."), cited in *Versant Funding LLC v. Teras Breakbulk Ocean Navigation Enters., LLC*, No. 17-CV-81140, 2025 WL 1440351, at *4 (S.D. Fla. May 20, 2025).

[9] *See* Nicole Black, *Do NOT, I Repeat, Do NOT Use ChatGPT For Legal Research* (June 22, 2023, 1:47 PM), https://abovethelaw.com/2023/06/do-not-i-repeat-do-not-use-chatgpt-for-legal-research/ (Generative AI tools "are bald-faced liars that pull facts out of thin air . . . , including legal cases"); *see also, e.g.*, Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 27, 2023), https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html; Larry Neumeister, *Lawyers Submitted Bogus Case Law Created by ChatGPT. A Judge Fined Them $5,000*, ASSOCIATED PRESS (June 22, 2023), https://apnews.com/article/artificial-intelligence-chatgpt-fake-case-lawyers-d6ae9fa79d0542db9e1455397aef381c; Erin Mulvaney, *Judge Sanctions Lawyers Who Filed Fake ChatGPT Legal Research*, WALL ST. J. (June 22, 2023), https://www.wsj.com/us-news/judge-sanctions-lawyers-who-filed-fake-chatgpt-legal-research-9ebad8f9; and LegalEagle, *How to Use ChatGPT to Ruin Your Legal Career*, YOUTUBE.COM (June 10, 2023), https://www.youtube.com/watch?v=oqSYljRYDEM (cited in *Schoene v. Ore. Dep't of Human Servs.*, No. 23-cv-742, 2025 WL 1755839, at *7 n.6 (D. Or. June 25, 2025)); and Lyle Moran, *Lawyer Cites Fake Cases Generated by ChatGPT in Legal Brief*, LegalDive (May 30, 2023), https://www.legaldive.com/news/chatgpt-fake-legal-cases-generative-ai-hallucinations/651557/; Sara Merken, *AI 'Hallucinations' in Court Papers Spell Trouble for Lawyers*, REUTERS (Feb. 18, 2025, 2:55 PM), http://reuters.com/technology/artificial-intelligence/ai-hallucinations-court-papers-spell-trouble-lawyers-2025-02-18/ (both cited in *Powhatan Cnty. Sch. Bd. v. Skinger*, No. 24cv874, 2025 WL 1559593, at *9 n.7 (E.D. Va. June 2, 2025)).

[10] *Available at* https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/e43964ab-8874-4b7a-be4e-63af019cb6f7/Illinois%20Supreme%20Court%20AI%20Policy.pdf (Effective Jan. 1, 2025) ("Attorneys, judges, and self-represented litigants are accountable for their final work product. All users must thoroughly review AI-generated content before submitting it in any court proceeding to ensure accuracy and compliance with legal and ethical obligations. Prior to employing any technology, including generative AI applications, users must understand both general AI capabilities and the specific tools being utilized.").

Counsel's professed ignorance of the dangers of using ChatGPT for legal research without checking the results is in some sense irrelevant. Lawyers have ethical obligations not only to review whatever cases they cite (regardless of where they pulled them from), but to understand developments in technology germane to their practice.[11] And there are plenty of opportunities to learn—indeed, the Illinois State Bar Association chose "Generative Artificial Intelligence – Fact or Fiction" as the theme of its biennial two-day Allerton Conference earlier this year, calling the topic "one that every legal professional should have on their radar."[12] Similar CLE opportunities have been offered across the nation for at least the past two years.

The bottom line is this: at this point, no lawyer should be using ChatGPT or any other generative AI product to perform research without verifying the results. Period. *See, e.g.*, *Lacey v. State Farm Gen. Ins. Co.*, No. CV 24-5205, 2025 WL 1363069, at *3 (C.D. Cal. May 5, 2025) ("Even with recent advances, no reasonably competent attorney should out-source research and writing to this technology—particularly without any attempt to verify the accuracy of that material."); *Mid Cent. Operating Eng'rs*, 2025 WL 574234, at *2 ("It is one thing to use AI to assist with initial research, and even non-legal AI programs may provide a helpful 30,000-foot view. It is an entirely different thing, however, to rely on the output of a generative AI program without verifying the current treatment or validity—or, indeed, the very existence—of the case presented."). In fact, given the nature of generative AI tools, I seriously doubt their utility to assist in performing accurate research (for now). "Generative" AI, unlike the older "predictive"

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[11] *See, e.g.*, ABA Model Rule 1.1, Comment 8, made applicable here by Local Bankruptcy Rule 9029-4A (and applicable to all Illinois lawyers following adoption by the Supreme Court of Illinois), requires lawyers to "keep abreast of changes in the law and its practice, including benefits and risks associated with relevant technology."

[12] Mallory P. Sanzeri, *Allerton Conference 2025: Exploring the Future of Law with Artificial Intelligence*, ILLINOIS STATE BAR ASSOCIATION, https://www.isba.org/sections/ai/newsletter/2025/03/allertonconference2025exploringthefutureoflawwitha (last visited July 17, 2025).

AI, is "a machine-learning model that is trained to *create* new data, rather than making a prediction about a specific dataset. A generative AI system is one that learns to generate more objects that *look like* the data it was trained on." Adam Zewe, *Explained: Generative AI*, MIT NEWS (Nov. 9, 2023), https://news.mit.edu/2023/explained-generative-ai-1109 (emphasis added). Platforms like ChatGPT are powered by "large language models" that teach the platform to create realistic-*looking* output. They can write a story that reads like it was written by Stephen King (but wasn't) or pen a song that sounds like it was written by Taylor Swift (but wasn't). But they can't do your legal research for you. ChatGPT does *not* access legal databases like Westlaw or Lexis, draft and input a query, review and analyze each of the results, determine which results are on point, and then compose an accurate, Bluebook-conforming citation to the right cases—all of which it would have to do to be a useful research assistant. Instead, these AI platforms look at legal briefs in their training model and then create output that *looks like* a legal brief by "placing one most-likely word after another" consistent with the prompt it received. Brian Barrett, "*You Can't Lick a Badger Twice": Google Failures Highlight a Fundamental AI Flaw*, WIRED (Apr. 23, 2025, 7:44 PM), https://www.wired.com/story/google-ai-overviews-meaning/.

If anything, Mr. Nield's alleged lack of knowledge of ChatGPT's shortcomings leads me to do what courts have been doing with increasing frequency: announce loudly and clearly (so that everyone hears and understands) that lawyers blindly relying on generative AI and citing fake cases are violating Bankruptcy Rule 9011 and will be sanctioned. Mr. Nield's "professed ignorance of the propensity of the AI tools he was using to 'hallucinate' citations is evidence that [the] lesser sanctions [imposed in prior cases] have been insufficient to deter the conduct." *Mid Cent. Operating Eng'rs*, 2025 WL 574234, at *3.

The second reason I issue sanctions is that, as described above, I also have concerns about the way this particular case was handled. I understand that Debtor's counsel has a massive docket of cases. But every debtor deserves care and attention. Chapter 13 cases can be challenging to file and manage—especially when they involve complexities like those in this case. If a law firm does not have the resources to devote the time and energy necessary to shepherd hundreds of Chapter 13 cases at the same time, it should refer matters it cannot handle to other attorneys who can—lest a search for time-saving devices lead to these kinds of missteps. What I mean to convey here is that while everyone makes mistakes, I expect—as I think all judges do—attorneys to be more diligent and careful than has been shown here.[13]

IV.

The sanctions that I choose "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Bankr. P. 9011(c)(4). And to be clear, I am *only* picking sanctions to redress the conduct described in the Order to Show Cause, *not* the further alleged misconduct described in the Chapter 13 Trustee's brief. (*See* Dkt. No. 69 at 3) I agree with the U.S. Trustee that the sanctions within my discretion include an ARDC referral, a monetary sanction, a finding that the compensation to be paid to counsel exceeds the reasonable value of their services per 11 U.S.C. § 329, and/or a non-monetary sanction. Semrad has advised me that it will not seek compensation for this case, so a Section 329 finding is not necessary. And Semrad advises that Mr. Nield has already self-reported to the ARDC, mooting that option, too. What I believe is necessary here, and constitutes the least

[13] Here's another example of what I am talking about: Mr. Nield filed a reasonably compelling brief telling his side of the story (*see* Dkt. No. 71), but he did not sign it. Bankruptcy Rule 9011(a) requires all briefs to be signed and provides that "[t]he court must strike an unsigned document unless the omission is promptly corrected after being called to the attorney's or party's attention." I note this not just to point out another error caused by inattention, but to alert counsel that I am required by the Bankruptcy Rules to strike his brief if he does not sign and re-file it promptly.

harsh sanctions appropriate to address the conduct and deter repetition by others similarly situated, has two parts—one monetary and one non-monetary.

First, I order Mr. Nield and Semrad, jointly and severally, to pay a penalty to the Clerk of the Bankruptcy Court of $5,500.[14] I seriously considered a larger fine, but after reading their briefs, I believe this sum is sufficient given the candor and remorse both Mr. Nield and Semrad have shown since the Order to Show Cause was issued, the seriousness with which they have addressed the Order already, and the attention they gave the Debtor to confirm the most recent Plan following the June 10 hearing. I view this as a modest sanction, and the next lawyer who does the same thing is warned that he or she will likely see a more significant penalty.

Second, more education (and in-person education) is always better, and I believe additional in-person education is necessary given the conduct here. Fortunately, this year's annual meeting of the National Conference of Bankruptcy Judges (NCBJ) is here in Chicago, making the meeting convenient and not burdensome for local attorneys to attend in person. Even more fortuitously, during the meeting, at 9:00 a.m. on Friday, September 19, 2025, NCBJ will hold a plenary session titled "*Smarter Than Ever: The Potential and Perils of Artificial Intelligence*" to which all registered attendees and their guests are invited.[15] Mr. Nield, and at least one other senior attorney at the Semrad firm (chosen by Mr. Semrad), are ordered to register for and attend that session of the NCBJ annual meeting in person. Others reading this opinion are welcome, too.

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[14] Bankruptcy Rule 9011 requires that Semrad be equally responsible for Mr. Nield's conduct absent "exceptional circumstances." *See* Fed. R. Bankr. P. 9011(c)(1). I see no such "exceptional circumstances" here and thus a joint-and-several penalty is appropriate.

[15] Annual Meeting Schedule, NCBJ, https://ncbj.org/annual-meeting/schedule-events/complete-schedule/.

V.

For the reasons stated here, I will issue a separate order,

1. Finding that Thomas E. Nield and The Semrad Law Firm, LLC, have violated Rule 9011 of the Federal Rules of Bankruptcy Procedure.

2. Imposing sanctions for the violation of Rule 9011:

   a. directing Mr. Nield and Semrad, jointly and severally, to pay a penalty of $5,500 to the Clerk of the Bankruptcy Court within 10 days,

   b. directing Mr. Nield to register and attend in person the NCBJ plenary session on Artificial Intelligence, and

   c. directing Semrad to have a second senior attorney register for and attend the NCBJ AI session in person; and

3. Concluding the section 329 examination as moot.

Signed: July 18, 2025 By: _____

MICHAEL B. SLADE
UNITED STATES BANKRUPTCY JUDGE

PUBLICATION

The Perils of Legal Hallucinations and the Need for AI Training for Your In-House Legal Team!

Authors: Justin S. Daniels, Matthew George White
June 30, 2025

Generative AI is rewriting how lawyers work at record speed, but is also quietly flooding Courts with phantom citations and invented case law along the way. In recent months, a number of judges across the country have sanctioned attorneys for submitting briefs laced with fictitious case law conjured by generative AI tools like ChatGPT. These so-called "hallucinations" aren't just embarrassing, they can constitute professional misconduct, jeopardize your company's interests, and damage the credibility of the legal profession in an already skeptical courtroom environment. In fact, since mid-2023, more than 120 cases of AI-driven legal "hallucinations" have been identified, with at least 58 occurring so far in 2025.

Court filings, from trial court motions to appellate briefs, are increasingly peppered with AI-generated content. When used responsibly, generative AI can help lawyers draft faster, research more efficiently, and focus on higher-value strategic work. However, judges across the country, from Federal District Courts to State Supreme Courts, are flagging submissions riddled with citations that never existed. In one notable example reported by the *ABA Journal*, a special master imposed a $31,100 sanction against a firm for relying on bogus AI research in a filed brief. This underscores the growing legal and financial risks of unverified AI use, whether intentional or not.

The surge in AI-generated Court filings reveals something deeper about the legal profession's evolving relationship with technology. Generative AI does not deal in certainties, it is predicated on probabilities, so its mistakes are *features,* not *bugs*. That reality demands a deliberate, defensible process for integrating AI tools into legal workflows. Too often, attorneys treat AI content like a finished product rather than what it really is: the work of a young virtual lawyer that still needs supervision, guidance, and a thorough cite check.

The solution to managing AI-hallucinated Court filings isn't to ban AI from legal practice, it's better training. Attorneys must be trained to use AI tools appropriately and responsibly. Too few legal teams are taught how to develop a consistent and repeatable prompting process or how to methodically verify the accuracy of AI-generated citations before inclusion in a court filing. In fact, many Courts have taken matters into their own hands by mandating this process and requiring firms to affirmatively certify they fact-checked all AI-generated sources. These emerging mandates signal a broader shift: using AI is no longer optional, but verifying its output is non-negotiable.

Effective legal training begins with a mindset shift: AI-generated content should be verified, not trusted. This requires a strong prompting process with a foundational principle of skepticism toward AI output.

Successful training programs incorporate three fundamental principles:

1. **Tailored prompt training** for legal-specific use cases, including live examples or hallucinations and examples of manipulation, jailbreaking, or rooting AI tools;

2. **Verification techniques** that instill muscle memory – making it second nature for legal professionals to fact-check all generative AI output before relying on it; and
3. **Ongoing, customized education**, similar to CLE, ensuring legal teams stay current as AI tools evolve and as different platforms exhibit differing strengths, limitations, and risks.

AI isn't the problem, poor process is. The spike in hallucinated filings is not a technology failure, but a failure to train lawyers to use AI tools effectively and appropriately. This moment presents an opportunity for in-house legal departments to build smart, defensible workflows to make AI an asset, not a liability.

Baker Donelson's AI Team works regularly with in-house counsel across the country to design prompting protocols, verification safeguards, and training programs to reduce risk and reinforce credibility. If your team is ready to embrace AI while protecting your brand, your counsel, and your bottom line, we are here to help. As Justice Cardozo once said, *"The law, like the traveler, must be ready for the morrow. It must have a principle of growth."* We can train your in-house legal team legal department to grow using AI safely, strategically, and with credibility intact.

The Firm's attorneys are prepared to assist you in navigating the complexities surrounding AI tools and proper use; please reach out to Justin Daniels, Matt White, or any member of Baker Donelson's AI Group

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TWO YEARS OF FAKE CASES AND THE COURTS ARE RATCHETING UP THE SANCTIONS

Heather L. LaVigne
Assistant Bar Counsel

In June 2023, the U.S. District Court for the Southern District of New York imposed the first-ever sanctions against attorneys for their improper use of generative AI in court pleadings in the *Mata v. Avianca, Inc.* case.[1] As most people in the legal community are now aware, the attorneys in that case submitted pleadings to the court that contained citations to nonexistent cases. The court found that the fake cases had been generated, or "hallucinated," by a generative AI program that the attorneys had used to draft their pleadings, and it imposed monetary sanctions against the attorneys. For more information on this case, and AI in general, see Afton Pavletic, *The Wild West of Artificial Intelligence* (Jan. 2024).

In the two years since *Mata*, the American Bar Association (ABA),[2] state ethics authorities,[3] and courts have issued guidance, opinions, and orders regarding the use of AI in the practice of law. In addition to the individual publications, legal information sites such as LawSites[4] and Justia[5] have made many of these resources easily accessible on their websites. Further, many bar associations, legal publications,[6] and continuing legal education providers[7] have provided guidance, training, and information on using AI ethically in various types of law practices.

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[1] *See Mata v. Avianca*, *Inc.*, 678 F.Supp.3d 443 (S.D.N.Y. 2023) (opinion and order on sanctions).

[2] ABA Formal Opinion 512 - Generative Artificial Intelligence Tools (2024), available at The ABA's Website.

[3] *See*, *e.g.*, Florida Proposed Advisory Opinion 24-1; California, Practical Guidance for the Use of Generative AI in the Practice of Law (2023); 2024 NC Formal Ethics Op. 1.

[4] *See*, *e.g.*, Robert Ambrogio, *A Compendium of Legal Ethics Opinions on Gen AI (As Compiled by - You Guessed It - Gen AI)* (2025).

[5] *See*, *e.g.*, Justia, AI and Attorney Ethics Rules: 50-State Survey. This resource contains links to opinions, articles, and informal guidance from various jurisdictions.

[6] *See*, *e.g.*, Andrea Martin & April Garbuz, *The Ethical Imperative to Embrace AI in Commercial Litigation*, Boston Bar Journal (May 22, 2025); Dyane O'Leary, *GenAI is Not a Legal Tool. Or is it?*, Boston Bar Journal (May 17, 2024).

[7] For example, MCLE New England has many CLE programs available relating to AI (both on demand and as part of its future programming) that are easily accessible using a link from their home page called, "Artificial Intelligence Resources." Many of these programs are designed to teach attorneys how AI can be properly used in practice while avoiding the risks.

Despite the increasing availability of information relating to AI's ability to generate fabricated content, many more lawyers have been sanctioned by courts and disciplined by disciplinary authorities for the very same conduct.[8] In fact, virtually all of the sanctions and discipline relating to the misuse of AI have resulted from the submission of fabricated legal authorities.[9]

This article discusses the AI-related sanctions and disciplinary orders relating to hallucinated content issued recently in Massachusetts, as well as a notable case from a federal court in Alabama. It also provides recommendations to lawyers regarding the implementation of AI policies and training in their organizations and references to resources to assist lawyers in using AI ethically. The hope, of course, is that we can put to bed the problem of hallucinated cases and avoid other AI-related problems.

Two Massachusetts Cases

In February 2024, the Massachusetts Superior Court (Hon. Brian Davis) was the first in the state to sanction an attorney for submitting pleadings containing AI-generated fictitious case citations. *See Smith v. Farwell*, *et al.*, No. 2282-CV-01197, 2024 WL 4002576 (Norfolk Sup. Ct. Feb. 15, 2024) (Davis, J., Findings, Rulings and Order Imposing Sanctions). The court explained that it was the "unhappy recipient of several legal memoranda . . . that cite and rely, in part, upon wholly-fictitious case law." *Id.* at *1. The court credited the lawyer's explanation that he did not know his associate used AI to draft the pleadings, that he was not familiar with AI, and that he failed to check the citations for accuracy when reviewing the associate's work.

The court found that the lawyer's submission of fake citations violated Mass. R. Civ. P. 7 and 11, and potentially violated several ethical rules: Mass R. Prof. C. 1.1, 1.3, and 5.1. The court imposed a $2,000 fine. The court then forewarned future attorneys by stating that this sanction was "mild given the seriousness of the violations that occurred." *Smith*, 2024 WL 4002576, at *7.

When the matter came before the Board of Bar Overseers, the lawyer admitted that his motions contained numerous inaccurate citations, nonexistent quotations, misrepresentations of the propositions of cases, and four nonexistent cases. As he had previously explained to the Superior Court, the lawyer was unaware that his staff had used an AI program to perform the legal research he relied upon in the motion, and he failed to check citations for accuracy. The lawyer received a public reprimand for violations of Mass. R. Prof. C. 1.1 (competence); 1.3 (diligence); 5.1 and 5.3

[8] A legal blogger has compiled a list of hundreds of legal decisions discussing instances in which AI-fabricated legal authority was presented to a court by someone involved in the litigation, 83 of which were presented by lawyers. *See* Damien Charlotin, AI Hallucination Cases, last accessed in August 2025. This author suspects that this list is under-inclusive due to the frequency with which these cases appear.

[9] In *Coronavirus Rep. Corp. v. Apple Inc.*, No. 24-CV-08860-EMC, 2025 WL 2162947 (N.D. Cal. July 30, 2025) (Order on Defendant's Motion for Sanctions and Plaintiffs' Motions), plaintiffs' counsel used ChatGPT to generate an exhibit that appeared to be a twenty-page petition seeking the resignation of Apple Inc.'s CEO, and attached it to three motions including a motion to permit amicus briefing in the matter. Counsel also included fake case citations in their motion. For this and other misconduct, the court awarded litigation fees and costs to the defendant in an amount to be determined later.

(supervision); and 8.4(d) (conduct prejudicial to the administration of justice). *Matter of Marullo*, 41 Mass. Att'y Disc. R. ___ (2025).

On June 25, 2025, the Massachusetts Superior Court (Hon. Keren Goldenberg) imposed sanctions against another attorney who claimed she was unfamiliar with the risks of generative AI when she used it to prepare motions and proposed jury instructions. *See Dastou v. Holmes*, No. 2381-CV-02212, 2025 WL 1907624 (Middlesex Sup. Ct. June 25, 2025) (Goldenberg J., Findings, Rulings, and Order Imposing Sanctions). The court found that the lawyer's filings contained citations to nonexistent cases, a quotation attributed to a real case that was not contained in the real case, misstatements as to the holding of real cases, and a proposed jury instruction that introduced what sounded like a legitimate legal concept, but was actually fictitious. The court issued sanctions enjoining the lawyer from billing her client for her work on the motions containing the fabricated citations and the litigation resulting from her misuse of AI. The court also ordered her to take a continuing legal education course.

In issuing the sanctions order in *Dastou*, the court aptly explained:

> Lawyers have a duty to provide competent representation of their clients and demonstrate candor towards the tribunal. Mass. R. Prof. Conduct 1.1 & 3.3. This extends to submitting filings that accurately state the law and present arguments that supports their clients' interests. By submitting motions and briefs that contain hallucinations and misstatements of the law, the lawyer violates their professional obligations.

Id. 2025 WL 1907624, at *1.

Massachusetts practitioners would be well-served to read the sanction orders in these matters. They provide a comprehensive discussion of the consequences of failing to properly review AI-generated content, which include violations of rules of civil procedure and professional conduct, the unnecessary consumption of the courts' time and resources, and failures to properly protect clients' interests.

A Federal Case Suggests That Sanctions Are Increasing

In July 2025, a federal court in Alabama opined that the sanctions commonly issued when lawyers have cited to fake, AI-generated legal authorities have been too lenient to deter this misconduct. *See Johnson v. Dunn*, - - F.Supp.3d - -, 2025 WL 2086116, at *1, *20 (N.D. Ala. July 23, 2025). In that case, attorneys representing the Commissioner of the Alabama Department of Corrections filed two motions containing five "problematic" citations. Several attorneys had worked on the motions, but none of them had checked the problematic citations. The court ably described the harm caused by the submission of fabricated legal authority to a court when it stated:

> Even in cases like this one, where lawyers who cite AI hallucinations accept responsibility and apologize profusely, much damage is done. The opposing party expends resources identifying and exposing the fabrication; the court

> spends time reviewing materials, holding hearings, deliberating about sanctions, and explaining its ruling; the substance of the case is delayed; and public confidence about the trustworthiness of legal proceedings may be diminished.

Id. at *11.

In considering the appropriate sanctions, the court added,

> Fabricating legal authority is serious misconduct that demands a serious sanction. . . . [I]t demands substantially greater accountability than the reprimands and modest fines that have become common as courts confront this form of AI misuse. As a practical matter, time is telling us – quickly and loudly – that those sanctions are insufficient deterrents. In principle, they do not account for the danger that fake citations pose for the fair administration of justice and the integrity of the judicial system.

Id. at *1.

While the court sanctioned the individual attorneys who worked on the motions, the court did not sanction the firm. This was, in part, because the firm had been proactive in attempting to prevent the misuse of AI and had responded to the incident swiftly. Specifically, the court noted that the firm "proactively addressed the challenges of AI as early as June 2023[.]" *Id.* at *15. It did so by warning its employees of the risks that AI can generate fictitious content, implementing an internal AI policy requiring, among other things, that all citations be reviewed for accuracy, and establishing an AI committee to work on a more comprehensive AI policy. The court also found that after the incident came to the firm's attention, the firm warned its employees again, announced a firm-wide training, and was in the process of updating its AI policies with "lessons learned" from the incident.

With respect to the individual attorneys, the court issued a public reprimand, disqualified them from further appearances in the matter, and referred them to disciplinary authorities.

Citing to Hallucinated Cases is a Human Problem

Certainly, AI poses a lot of complicated issues in today's world, but the sanctions and disciplinary orders issued since 2023 show that lawyers who present hallucinated cases to courts are cutting corners with respect to fundamental lawyering duties. For example, checking citations for accuracy is not a new obligation. Neither is reviewing a subordinate's work product. Generative AI simply presents a greater chance that a lawyer will present fabricated legal authority (and arguments) to a tribunal when cutting corners on these fundamental lawyering duties. This is actually good news, because when we have human problems, we have human solutions. One part of this solution is for legal employers to establish policies and provide training relating to the use of AI in their work.

Policies and Training

While the details of an internal AI policy are beyond the scope of this article, drafters of AI policies should consider the following, based on lessons learned over the past two years:

AI policies should include education and warnings about the risks of AI including, but not limited to, its ability to create fictitious content.[10]

Many of the AI-misuse cases to date show that some lawyers are still unaware of the nature and extent of the risks of generative AI. This excuse, however, is insufficient to avoid sanctions and discipline. As Comment [8] to Mass. R. Prof. C. 1.1 (competence) makes clear, lawyers are required to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, and engage in continuing study and education."[11] Lawyers choosing to use AI in their practice must engage in the appropriate study and education to provide competent representation.

On this point, lawyers should heed Judge Davis's warning in *Smith*, that "a defense based on ignorance will be less credible, and likely less successful, as the dangers associated with the use of Generative Al systems become more widely known." 2024 WL 4002576, at *7.

AI policies should include guidance regarding the need to verify citations and other AI-outputs to ensure their accuracy.

The sanctions and disciplinary cases arising out of the submission of fabricated legal authority evidence that lawyers have filed documents without first cite-checking and reviewing those documents for accuracy. Lawyers, however, cannot abdicate this responsibility when using AI or delegate it to the technology. Lawyers must review the outputs from AI tools to ensure their accuracy in order to comply with their ethical obligations of competence and diligence.

Judge Goldenberg said it clearly in *Dastou, supra:* "Lawyers who assume the risk of using generative AI must establish a thorough review process to ensure accuracy, ethical compliance, and protection of client interests." 2025 WL 1907624, at *2.

AI policies should include guidance relating to communication about AI within work groups.

Many of the cases to date have demonstrated that colleagues who are working together on court filings are not communicating about their use of AI, resulting in some lawyers' being unaware that AI was used. Such lack of awareness, however, is not a defense; lawyers are responsible for the work product that they sign and submit to a court or other tribunal. *See*, *e.g.*, Mass. R. Civ. P. 7 and 11 ("the signature of any attorney to a pleading constitutes a certificate that the attorney has read the pleading; that to the best of the attorney's knowledge information, and belief there is a

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[10] Another important risk is the potential for disclosure of confidential information. *See generally* Mass. R. Prof. C. 1.6 (confidentiality of information), 1.9(c) (duties to former clients) and 1.18(b) (duties to prospective clients).

[11] For further discussion of a lawyer's duty of technology competence see this author's prior articles, From Technophobe to Technolawyer (March 2018) and It's 2024, Are You Technology Competent? (March 2024).

good ground to support it"); Fed. R. Civ. P. 11 (any lawyer who signs, files, submits, or later advocates for any pleading, motion or other papers is responsible for its content). From an ethical perspective, Mass. R. Prof. C. 5.1 and 5.3, require that lawyers provide proper supervision to subordinate lawyers and nonlawyers. Further, Mass R. Prof. C. 5.2 makes clear that subordinate lawyers remain responsible for their own misconduct in most circumstances. Work teams must, therefore, communicate about their use of AI in order for each lawyer to comply with their professional obligations. Indeed, in *Smith*, Judge Davis made clear that lawyers "are obligated . . . to know whether AI technology is being used in the preparation of court papers that they plan to file in their cases[.]" 2024 WL 4002576, at *7.

AI policies should include guidance on how employees and the organization might respond to any AI-related incidents.

Beginning with *Mata*, *supra*, many of these cases have involved lawyers who claim ignorance, bury their heads in the sand, and even make false statements to courts relating to their use of AI. These types of responses require more of the court's time, create more harm to clients, and further erode public confidence in the legal system. They are also likely to result in greater court sanctions and more severe bar discipline.

A plan for responding to AI-related mishaps will allow for quicker response times and remedial efforts, which could mitigate the harm. From a disciplinary perspective, a response plan could help lawyers to avoid compounding their misconduct with more misconduct, by providing a path forward when they realize they made a mistake. *See generally* Mass. R. Prof. C. 3.3 (candor to the tribunal).

The Office of Bar Counsel's ethics helpline is also available to assist lawyers with questions about how to respond to such a mishap. This service is of course also available to assist lawyers in avoiding such mishaps in the first place, by providing callers with an opportunity to discuss in advance their planned use of AI in their practices and the potential ethical pitfalls they may encounter.[12]

AI policies should include a continuing training component and provide for periodic updating.

As with most technology, AI will not remain static and best practices will evolve. There are many resources available for lawyers and their assistants to keep up with that evolution. In addition to the various resources referenced in this article, Massachusetts lawyers have a panoply of webinars, articles and in-person programs to choose from through bar associations; MCLE| New England, Lawyers Concerned for Lawyers, and the ABA. While resources targeted to paralegals and legal assistants are harder to find, many of the resources available to lawyers will be useful and accessible to paralegals and legal assistants, who should be encouraged to participate.

[12] To reach the ethics helpline, call (617) 728-8750 on Mondays, Wednesdays, and Fridays between the hours of 2:00pm and 4:00pm.

Conclusion

Artificial intelligence is here to stay, and many legal practitioners appreciate how the proper use of AI tools can make their jobs easier, more efficient, and less stressful. Improper reliance on these tools, however, can have a detrimental effect on the courts, clients, and the perception of the legal profession. Lawyers must make sure that they understand the AI tools they are using and cannot blindly accept the content they generate. Lawyers must pair their use of AI with their existing legal training and lawyering skills. Remember, you were hired because of your education, experience, and legal skills, none of which can be replaced by artificial intelligence.

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